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{SHOW } PROCEEDINGS AND ORDERS DATE: 121384

CASE NBR 84-1-00169 CFH
SHORT TITLE Brown, Warden DOCKETED: Jul 27 1984
VERSUS Chaney, Larry L.

Date	Proceedings and Orders
Jul 27 1984	Petition for writ of certiorari filed.
Jul 27 1984	Appendix of petitioner Brown, Warden filed.
Aug 10 1984	Order extending time to file response to petition until September 13, 1984.
Sep 17 1984	Brief of respondent Chaney, Larry L. in opposition filed.
Sep 17 1984	Motion of respondent for leave to proceed in forma pauperis filed.
Sep 19 1984	DISTRIBUTED. October 5, 1984
Oct 9 1984	REDISTRIBUTED. October 12, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 26 1984	REDISTRIBUTED. November 30, 1984
Dec 3 1984	REDISTRIBUTED. December 7, 1984
Dec 10 1984	Motion of respondent for leave to proceed in forma

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 121384

CASE NBR 84-1-00169 CFH
SHORT TITLE Brown, Warden DOCKETED: Jul 27 1984
VERSUS Chaney, Larry L.

Date	Proceedings and Orders
Dec 10 1984	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Dec 10 1984	Petition DENIED. Dissenting opinion by The Chief Justice with whom Justice White and Justice Rehnquist join. (Detached opinion.)

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84-1699

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,
Petitioner,
v.
LARRY LEON CHANEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant's Motion to Produce, which requests all statements in the possession of the State, constitutes a general or a specific request for evidence.

2. Whether the United States Court of Appeals for the Tenth Circuit applied the correct test under United States v. Agurs in assessing whether the jury would have imposed the death penalty had the withheld evidence been disclosed.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,
Petitioner,

v.

LARRY LEON CHANEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioner, John N. Brown, Warden, Oklahoma State Penitentiary, McAlester, (hereinafter referred to as the "State"), prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit from which certiorari is sought was reported as Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). See Appendix A & B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion and judgment of the United States Court of Appeals for the Tenth Circuit was filed on March 21. A timely Petition for Rehearing was denied in an Order filed on May 30, 1984. See Appendix C.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Respondent, Larry Leon Chaney (hereinafter referred to as the "Defendant") was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of Okla. Stat. tit. 21, § 701.7.

The Defendant was convicted of murdering a woman named Kendal Inez Ashmore by strangulation. In the second stage, the State introduced evidence that the

Defendant had also strangled a young woman named Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped with her.

The facts that the State presented at trial revealed that on March 17, 1977, the deceased's husband, Phillip Ashmore, left his residence for work (Tr. 342-343). Mr. Ashmore was in the construction business (Tr. 337); and he and his wife also were engaged in the business of raising Morgan horses at their residence, which was on a farm (Tr. 338-341). Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck (Tr. 345). Mr. Ashmore never saw his wife alive again (Tr. 346).

After receiving a telephone call from one of his children, Mr. Ashmore returned to his home and found that neither his wife nor the employee, Kathy Ann Brown, were there (Tr. 347-349). After he rounded up the horses, Mr. Ashmore received a telephone call in which the caller stated that he had "got your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills . . . if anybody asks where your wife is you tell them she is out looking at Morgan horses." (Tr. 351). The caller promised to telephone the next night with instructions regarding the delivery of the money. The caller also stated that if anyone heard about the call, "I'll do to your wife what I did to that honky that works for you." (Tr. 351-352). Mr. Ashmore immediately called his attorney,

who then contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to the Ashmore home. At approximately 7:00 p.m., a person with the same voice called again (Tr. 358,363,364) and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified location at a rodeo arena by 7:30 p.m. or his wife would be "dead" (Tr. 363). The rodeo grounds were approximately 2½ miles from the Ashmore home (Tr. 365) and within 2 miles from the Defendant's residence (Tr. 542-543). The caller also advised Mr. Ashmore that his truck was at 91st and Memorial (Tr. 363). This call was

tape recorded and played to the jury (Tr. 361-363).

Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds (Tr. 369-370). Later, at approximately 9:30 p.m. the same day (Tr. 371), he received another call from a man with the same voice (Tr. 371,373-374) who advised him that he had not left the money in the proper place, that he should pick up the money, and that he would receive another call the next day. The caller stated that if Mr. Ashmore did not do exactly as he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, mother-fucker" (Tr. 373). This call was also tape recorded and played to the jury (Tr. 372). Mr. Ashmore did not receive any more calls concerning his wife.

The call which was made at approximately 7:00 p.m. (Tr. 411) directing Mr. Ashmore to the rodeo grounds and telling him that his pickup was at 91st and Memorial was traced to the Defendant's telephone number at his residence (Tr. 406,408,415). The last call, which was made at 9:27 p.m. (Tr. 424) was traced to a service station phone booth (Tr. 420-421). The Defendant's palmprint was taken from the receiver handle on that telephone (Tr. 431,452).

After receiving this information, the police set up surveillance at the Defendant's home, as stated previously, was within 2 miles of the rodeo grounds where the ransom money was to be delivered; and on March 19, at 3:20 a.m., the police arrested the Defendant and searched his house, looking for the

victims or evidence of the victims' whereabouts (Tr. 504-587).

A search of a wastepaper basket in the Defendant's kitchen revealed torn-up pieces of paper (State's Exhibits No. 18 and 30)[1], which, when reassembled, contained the words, "Richard Elloit, [sic] 1:00 P.M." and "Thursday" and the numbers "299-9791" and "9148: (Tr. 397, 579). The Ashmore's home telephone number, which was the number which the extortionist called (Tr. 408), was 299-9791 (Tr. 342); and the numbers "9148" are the numbers of the Ashmore street address (Tr. 397). A handwriting expert testified that the notations on the torn piece of paper found in the waste paper basket in the Defendant's residence were made by the Defendant (Tr. 1119). Fur-

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[1] State's Exhibit Nos. 18 and 30 are the same exhibit (Tr. 711).

thermore, the Defendant's fingerprints were found on this note (Tr. 588-589).

The pickup which Mrs. Ashmore had been driving was found at 91st and Memorial in Tulsa (Tr. 482-483), just as the caller had stated (Tr. 363) and which was the location noted in a note found at in the Ashmore pickup. This note was half of a piece of paper and was found on the seat of the pickup (State's Exhibit No. 12; Tr. 471). This note was in Mrs. Ashmore's handwriting (Tr. 381) with the words "1:00 Thur.," "91st and Memorial" and "Richard Elliot" and the numbers "581-3106" and "352" (Tr. 381-383,468-471; State's Exhibit No. 12). According to an FBI expert, the other half of the paper was found in the Ashmores' home (Tr. 588-589). Also found in the pickup was an Arby's Roast

Beef Sandwich wrapper (State's Exhibit No. 23; Tr. 454,478).

On March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the Petitioner's property near the City of Sallisaw, a town approximately 100 miles each of Tulsa. Her hands were tied behind her back, she was gagged and she had been stragled with a strip of a towel (Tr. 727,825-830). The gravesite was roughly .4 to .5 of a mile from a campsite where the Defendant was building a cabin (Tr. 887).

The earth of the grave where Mrs. Ashmore's body was found had a crust on it which Undersheriff Art Lee testified was indicative of rainfall (Tr. 723). Mr. Lee also testified that a heel print appeared on the grave that appeared to have been eroded by rainfall (Tr. 723-724,735-736). A stipulation was

entered into which demonstrated that the only rain which fell in the Sallisaw area between March 17 and March 22 occurred between 7:00 a.m. and 7:00 a.m. March 17-18 (Tr. 711-712).

Mr. Lee also testified that a purse and billfold were found with the bodies; and they appeared to be damp, particularly the billfold, which he characterized as being "very damp" (Tr. 729-730).

Mrs. Ashmore's face revealed a "good deal" of lipstick and other makeup was visible (Tr. 740,742). She was wearing blue jeans with a crease in the leg (Tr. 741).

The State also presented witnesses who placed the Defendant in the area near where Mrs. Ashmore's body was found on the day of the kidnapping, including neighbors of the Defendant who saw the Petitioner driving a vehicle on that

property late on the afternoon of the kidnapping (Tr. 671-673,687-688). Furthermore, on the afternoon of the kidnapping, the Defendant was observed using a telephone in a convenience store near Sallisaw, within five or six miles of the burial site, by a witness who testified that the defendant appeared dirty and had dirt stains on his pants from the knees down (Tr. 695). Telephone records introduced by way of stipulation confirmed that a telephone call charged to the Defendant's residence (Tr. 793) was made from the grocery store to a Mr. James Holman, who also testified concerning the call and the fact that the Defendant had borrowed a pickup from him two days before the murder (Tr. 638-640,643).

Furthermore, on the night before the kidnapping, the Defendant checked into

a motel near Sallisaw (Tr. 650-653). The operator of the motel testified that, after the Defendant checked out the next morning, he found that three bath towels were missing and that there was red clay-like mud on the bedspread (Tr. 659,867-868).

Other witnesses testified concerning the Defendant's borrowing and then exchanging a four-whell-drive pickup for a 1967 Dodge pickup for use on his property on March 15 until he returned such on March 18 (Tr. 593-643).

The property where Mrs. Ashmore's body was buried was being rented by the Defendant, who was building a cabin at this location. A pick-ax which was found at the Defendant's Jenks residence when he was arrested was found to have soil particles on it consistent to

that at the grave where the bodies were buried (Tr. 777,783,884,893).

The autopsy of Mrs. Ashmore revealed that she had eaten approximately 2 hours prior to her death (Tr. 831). Dr. Hoffman, the pathologist, found that the stomach contents were similar to that of Arby's roast beef sandwiches (Tr. 831, 853). Dr. Hoffman stated that his findings were consistent with death six days prior to his examining the bodies (Tr. 832,863). He also observed lipstick and mascara on Mrs. Ashmore's face (Tr. 832). He stated that Mrs. Ashmore's skin had been in a moist atmosphere for a considerable period of time (Tr. 833).

A slide of Mrs. Ashmore's leg was also shown to the jury to show the lack of hair growth prior to the time of her death (Tr. 844,869-872).

The defendant called a number of witnesses, including several who testified concerning the Defendant's nonviolent reputation (Tr. 930,934,936).

The Defendant also called a pathologist, Dr. White, who claimed that the findings in his autopsy protocol were most consistent with Mrs. Ashmore having died no more than 24 to 48 hours prior to the autopsy (Tr. 1045).

The State then presented evidence that the handwriting on the torn note paper found in the Defendant's waste paper basket was that of the Defendant (Tr. 1119).

The jury found the Defendant guilty; and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been

bound, gagged, strangled and buried in the same grave with Mrs. Ashmore on the Defendant's property. The Defendant introduced evidence in mitigation, which included a stipulation concerning the Defendant's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty and found that four aggravating circumstances existed:

> "1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 in money from the family of Kendal Inez Ashmore.

> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge."

The jury specifically found the aggravating circumstances were not outweighed by any mitigating evidence which had been presented.

The Defendant perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, wherein the Oklahoma Court of Criminal Appeals affirmed the Defendant's conviction and sentence of death. Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980).

Thereafter, the Defendant filed a Petition for Writ of Certiorari with the Supreme Court of the United States, which was denied by that Court. Chaney v. Oklahoma, 450 U.S. 1025 (1981).

On April 3, 1981, the Defendant filed his first Application for Post-Conviction Relief under Okla. Stat. tit. 22, §§ 1080 et seq. The Defendant's Application was based upon a contention that allegedly exculpatory evidence had been withheld by the prosecution. Hearings on this allegation were held before the trial judge, Judge Dalton, on May 1, 1981, and July 8, 1981.

At the May 1, 1981, hearing, the Defendant called one witness, the trial prosecutor, S.M. Fallis, who was the District Attorney of Tulsa County. The Defendant also introduced into evidence

a stipulation entered into with the State.

Mr. Fallis was questioned concerning 3 Federal Bureau of Investigation reports which had not been disclosed to the Defendant. One report concerned an alleged sighting of the victim, Kendal Ashmore, by a woman by the name of Poppy Weaver on the afternoon of March 17, 1977. According to the FBI report, Ms. Weaver allegedly stated that she saw Mrs. Ashmore in the City of Jenks at the time when two fire trucks and two police cars went by the store where she had stopped. The stipulation entered into between the defense and the prosecution verified that a fire alarm was responded to in Jenks at 4:08 p.m. on March 17, 1977.

A second report referred to a man, identified as a Mr. Hamilton, who ob-

served the Ashmore's pickup on the morning of March 18, 1977. According to the report, Mr. Hamilton observed a man leaving the pickup between 8:00 a.m. and 8:30 a.m. on that day.

A third report concerned a student named Kyle West who was riding a school bus and who observed a red pickup truck on March 17, 1977, at the location where the Ashmore pickup was later discovered.

Mr. Fallis explained the relevance of each report and each sighting (P.C. Tr. 23-31). After he testified, in response to the court's inquiry, the Defendant's attorney stated that he had spoken to Ms. Weaver, Mr. Hamilton and Mrs. West (the mother of the student, Kyle West; see Habeas Corpus (Tr. 7-8[2]), but advised the court that he had not

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[2] "Habeas Corpus Tr." refers to the hearing before Judge Brett on June 17, 1983.

called any of those persons to testify as witnesses (P.C. Tr. 38).

On the second hearing before Judge Dalton, on July 8, 1981, the Defendant requested that he be allowed to call as a witness Agent Tom McClain of the FBI, who took the statement of Poppy Weaver, referred to above. The trial court refused to call the witness and ruled that the testimony of the agent, viewed in the context of the entire trial, was not material (Order of July 17, 1981). The Court denied the Defendant's Application on July 27, 1981.

The Defendant appealed that Order to the Court of Criminal Appeals of the State of Oklahoma, which entered an Order Affirming Denial of Post-Conviction Relief on November 12, 1981, in Case No. PC-81-345.

From the Court of Criminal Appeals' denial of post-conviction relief, the Defendant again petitioned the United States Supreme Court for review by way of writ of certiorari, which was denied by the Supreme Court on April 5, 1982. Chaney v. Oklahoma, 456 U.S. 919 (1982).

Thereafter, the Defendant filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B, the Honorable Thomas R. Brett. That Court dismissed the Petitioner's Petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, 455 U.S. 509 (1982).

The Defendant then filed another Application for Post-Conviction Relief which was again denied by the trial court on August 9, 1982.

The Defendant appealed that Order; and the Oklahoma Court of Criminal Appeals affirmed the denial of such on February 3, 1983, in Case No. PC-82-487. On May 19, 1983, the Court of Criminal Appeals issued an Order refusing to grant a Stay of Execution.

The Defendant then filed a third Petition for Writ of Certiorari with the United States Supreme Court, which was denied on June 6, 1983. On that date the Supreme Court also denied the Defendant's Application for a Stay of Execution. Chaney v. Oklahoma, ___ U.S. ___, 103 S.Ct. 2465 (1983).

On June 15, 1983, the Defendant filed the present Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. The Defendant also requested an evidentiary hearing with regard to

certain of his claims. On June 23, 1983, the District Court, the Honorable Thomas R. Brett, issued an Order overruling the Defendant's request for an evidentiary hearing.

Subsequently, on June 30, 1983, Judge Brett issued an Order denying the Defendant's Petition for Writ of Habeas Corpus. The Defendant appealed that Order to the United States Court of Appeals for the Tenth Circuit, which affirmed the Order of Judge Brett regarding the Defendant's conviction for Murder in the First Degree. However, the Court invalidated the Defendant's death sentence and it is from that portion of the Opinion and Judgment which the State seeks relief by way of certiorari with this Court.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFICT WITH THOSE OF OTHER CIRCUIT COURTS OF APPEAL WITH REGARD TO THE ISSUE OF WHETHER A REQUEST FOR A "STATEMENT" IS A SPECIFIC OR A GENERAL REQUEST.

In its Opinion vacating the Defendant's sentence, the Tenth Circuit conceded that its decision was in conflict with that of the Seventh Circuit in United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977) ("To the extent that United States ex rel. Moore v. Brierton [citation omitted] is inconsistent with our holding that Chaney made a specific Brady request, we choose not to follow it. . . . We are convinced for the reasons discussed above, despite the Seventh Circuit's characterization of the request in Moore, that Chaney here made a specific

Brady request"). 730 F.2d at 1344, n. 15; A.___, infra. Other Seventh Circuit cases confirms this conflict. Cramer v. Fahner, 683 F.2d 1376, 1382-1383 (7th Cir. 1982); United States v. Mackey, 571 F.2d 376, 388-389 (7th Cir. 1978).

The State contends that the Tenth Circuit's Opinion is also in conflict with decisions in at least four other Circuits. See United States v. Cody, 722 F.2d 1052, 1062, n. 1 (1st Cir. 1983); United v. Martorano, 663 F.2d 1113, 1114 (1st Cir. 1981); United States v. DiCarlo, 575 F.2d 952, 958-960 (1st Cir. 1978); United States v. Menghi, 641 F.2d 72, 74, n. 1 (2d Cir. 1981); Ostrer v. United States, 577 F.2d 782, 786 (2d Cir. 1978); Wagster v. Overberg, 560 F.2d 735, 739-741 (6th Cir. 1977); United State v. Goldberg, 582 F.2d 483, 488-490 (9th Cir. 1978); United States

v. Weiner, 578 F.2d 757, 767 (9th Cir. 1978); United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977).

In the present case the Defendant's Motion to Produce (Appendix D) is summarized in the Court's Opinion. 730 F. 2d at 1340-1342; A. 27-29. The Motion in essence requested statements of all persons who were interviewed by any government investigator. The Tenth Circuit found this request to be a specific one and held that the third test set forth in United States v. Agurs, 427 U.S. 97 (1976) should apply. The Tenth Circuit stated that since the withheld evidence "'might have affected' the jurors, or one of them in deciding the death penalty" the death sentence would be set aside. 730 F.2d at 1352; A. 87.

The State contends that it cannot conceive how any defense request for

exculpatory evidence could be more sweeping and general in nature. Furthermore, in addition to the previously cited cases which the State contends are in conflict with the present one, the State can see no distinction between this request and what the Court referred to as general requests in its Opinion. 730 F.2d at 1342-1343; A. 36-40.

For example, Tenth Circuit noted that in Hilliard v. Spalding, 719 F.2d 1443, 1444 (9th Cir. 1983), the Ninth Circuit had held that a request for "'all evidence known to the State which may prove the defendant's innocence'" constituted a general request. 730 F.2d at 1342; A. 36-37. However, the State contends that the only difference between that case and the present one is that the word "evidence" is used instead of the word "statements."

Since an investigatory file will consist entirely of "statements" (by witnesses, police officers, chemists, records personnel, pathologists, etc.) there is no difference between the words "statements" or "evidence" in either a practical or legal sense.

In Agurs the Supreme Court observed that a request for "all Brady material" or for "anything exculpatory" constitutes merely a general request. 427 U.S. at 106-107. It is the State's view that a request for all witnesses' statement is within this Court's definition of what should be a general request and that the Tenth Circuit erred when designated such to be a specific request.

Such a request is in reality a demand for the entire investigatory file. On the basis of this holding a defense attorney can now merely insert a request

in his discovery motion for "all statements of witnesses" and this will be held to constitute a specific request for all Brady material. This is hardly in accord with the holding of Agurs that a specific request gives the prosecutor "notice of exactly what the defense desire[s]." 427 U.S. at 106.

Additionally, the cases involving requests for exculpatory evidence reveal that the words "statements," "information," "evidence" and "material" are used interchangeably when seeking evidence in a prosecutor's possession. However, all of these words should be held to have the same meaning when evaluating whether a defendant's request is general or specific.

A review of the status of the different Circuit Court of Appeals decisions reveals that the Tenth Circuit's

Opinion is supported by three Circuit Court of Appeals (the Third, Fifth and Eighth[3]) A survey of the Court of Appeals decisions on this issue, that is, whether a defendant's motion to produce all statements, information, evidence, or material constitutes a general or a specific request follows:

CIRCUITS HOLDING SUCH A REQUEST TO BE GENERAL IN NATURE.

DISTRICT OF COLUMBIA

United States v. Mangieri, 694 F.2d 1270, 1288 (D.C. Cir. 1982). A statement by prosecutor, "[w]e have an understanding, of course, that in the event that any other documents turn up . . . I will turn them over" was held to be a general request.

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3 United States v. McCrane, 547 F. 2d 204 (3d Cir. 1976); United States v. Gaston, 608 F.2d 607 (5th Cir. 1979); and Scurr v. Niccum, 620 F.2d 186, 188 (8th Cir. 1980).

FIRST CIRCUIT[4]

United States v. Cody, 722 F.2d 1052, 1062, n. 1 (1st Cir. 1983). The defendant's pre-trial discovery motion requested:

> "Whether the government intends to call an informant or accomplice as a witness at trial. If so, please identify him . . . (d) any and all records, memoranda and correspondence between the witness and law enforcement authorities which might reasonably reflect on the witnesses' motives and relationship with the government."

It was further requested that the prosecution "[s]et forth all information and evidence, which would tend to excul-

---

4 In Ziegler v. Callahan, 659 F.2d 254, 267, n. 6 (1st Cir. 1981), the First Circuit stated that "[t]his Court has not conclusively determined whethr a defense request for all prior witness statements constitutes a specific reqeust or a general request under Agurs. It is the State's position that the following cases do not support that observation.

pate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment which information and evidence is within the knowledge of the government or which by due diligence could be discovered by or made known to the government." The Court held that taken either separately or together, the requests were not specific.

United States v. DiCarlo, 575 F.2d 952, 958-960 (1st Cir. 1978), the defense request for:

> "All statements or promises or rewards of any kind, or tending in any way, directly or indirectly to induce or encourage the giving of testimony, which statements have been made to any persons whom the government intends to call as witnesses at the trial of the indictment herein," and "[a]ll evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminating evidence or to mitigate the crime charged, or which may lead to evidence of such character."

This was held to be a general request.

SECOND CIRCUIT

United States v. Menghi, 641 F.2d 72, 74 (2d Cir. 1981). The defense counsel requested:

> "All information concerning bad acts or crimes committed by the government informant not reflected in his arrest/conviction record. . . . Whether or not the government informant used drugs or was an addict. . . . Any evidence indicating non-reliability of the government informant . . . . Any evidence which would be used to impeach the credibility of the government informant or other government witnesses. . . . Any material relevant or useful to the preparation of the defense at trial. . . ."

The Court held that the request was general.

Ostrer v. United States, 577 F.2d 782, 786-787 (2d Cir. 1978). A defense request for "any other material in the possession of the government bearing

adversely on the credibility, character, and reputation of Michael Hellerman" (the government's witness), and "any other material relating to any matter which defense counsel could properly used in cross-examination to inquire into Hellerman's motive and bias in favor of the Government" was held to be a "boilerplate" and a general request.

SIXTH CIRCUIT

Wagster v. Overberg, 560 F.2d 735, 736-739 (6th Cir. 1977). A defense attorney requested:

> ". . . all evidence and testimony in his (prosecution's) possession which may be favorable to the defendant; in particular, we would like to have the results of all forensic tests, ballistics tests, fingerprint tests, blood tests - that being tests of the blood of the decedent. We would also like to have copies of any statements made by any person to the prosecution whom the defense will call as their witnesses in chief, and

> who we have been informed the prosecution shall also call in chief."

The Court held this request to be general.

SEVENTH CIRCUIT

United States v. Mackey, 571 F.2d 376, 388-389 (7th Cir. 1978). In a prosecution for attempted income tax evation and conspiracy to evade payment of income taxes, the defense requested "[i]nformation relating to material inconsistencies between statements given by any person, whether or not he is a prospective Government witness, and information relating to material inconsistencies between two or more persons, whether or not they are prospective government witnesses." The prosecution failed to provide defense with a copy of a transcript of an interview between an

I.R.S. agent and a government witness. The Court held that the request was general and that "[a]t a minimum," the defense is required to "focus his request of a particular witness" before the request could be held to be specific.

United States ex rel. Moore v. Brierton, 560 F.2d 288, 292 (7th Cir. 1977). The defense requested "written statements in the possession of the Lansing police chief, or the Chicago superintendent of police taken from any witnesses subsequent to the murder." This was held to be a general request.[5]

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[5] Significantly, this is the same case, Moore v. Illinois, 408 U.S. 786 (1972), in which the Supreme Court held that the suppressed evidence did not violate Brady principles.

NINTH CIRCUIT

United States v. Goldberg, 582 F.2d 483, 488-490 (9th Cir. 1978). The defense requested "any written or recorded statements . . . made by the defendants or by any alleged conspirators not charged herein, . . . any other statements made by the Government witnesses," "any 'inconsistent' statements by Government witnesses" and "any documents in the governments possession or which it may acquire later . . . which may fall under the Brady rule." The Court held that it was doubtful that this was a specific request, and that it was more likely that the notice it gave the prosecutor was scarcely better than if no request had been made.

United States v. Weiner, 578 F.2d 757, 767 (9th Cir. 1978). The Court denied defendant's oral motion during

trial for an order "requiring the government to lodge all SEC transcripts and statements and interviews with witnesses by the FBI," "the postal service, or anyone else that were in possession of the United States Attorney, for the Court's examination to ferret out possible Brady material." The Court held that under Agurs, the request was equivalent to no request at all and that the trial judge "need not accord the slightest heed to such a shotgun approach."

United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977). The defense counsel "requested all probation reports, presentence interviews, and reports for 14 individual including David Stutler" (a co-conspirator who testified for the government). He further requested all "evidence favorable to him under the authority of Brady

. . . , including all information regarding police records, arrests, convictions, and any deals, promises or communications with government witnesses regarding benefits they may receive, or have already received, for testifying against defendant pursuant to Giglio, . . ." This was held to be a general request because it did not give "the prosecutor exactly what the defense desired. United States v. Agurs. . . ."

CIRCUITS HOLDING SUCH A REQUEST TO BE SPECIFIC IN NATURE

THIRD CIRCUIT

United States v. McCrane, 547 F.2d 204, 207 (3d Cir. 1976). The defense requested exculpatory material, or anything leading to exculpatory material, and "[m]aterial which may be used to impeach prosecution witnesses, including

but not limited to any standards used by the Department of Justice, the Treasury Department, the Internal Revenue Service or the United States Attorney in declining prosecution of similar cases." At the hearing on the pretrial motion, the Court specifically asked the prosecution if there was any Brady material in its files. The prosecution withheld certain letters that could have shown an "expectation of favor" between the prosecution and a government witness. The Court held that under the circumstances, the request was specific.

FIFTH CIRCUIT

United States v. Gaston, 608 F.2d 607, 610-613 (5th Cir. 1979). The defense counsel requested, "any prior statements of witnesses who had testified, including any interview reports

prepared by the FBI agents who investigated the case on FD-302 forms . . . to which he might be entitled. . . ." This was to be a specific request for production of the 302 forms.[6]

EIGHTH CIRCUIT

Scurr v. Niccum, 620 F.2d 186, 188-191 (9th Cir. 1980). The defense re-

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[6] Cf., United States v. Anderson, 574 F.2d 1347, 1351-1355 (5th Cir. 1978) where the following request was held to be general:

> "The recorded testimony of any co-defendant or alleged unindicted co-conspirator before the grand jury which relates to the offense charged in the indictment against the Defendant. Rule 16 (a); . . . All books, papers, documents, photographs, tangible objects, buildings or places in the control or possession of the Government which are material to the defense or intended for use by the Government in its case in Chief or any such items obtained from the Defendant. Rule 16(c)"

quested "all statements and any other evidence contained in police report[s] or County Attorney's files or Sheriff's files which are exculpatory in nature." The defense also made an oral statement at the hearing of the Motion to Produce declaring the name of witness for the State. The prosecution failed to disclose statements of the witness that tended to impeach him. The Court held the request to be specific.

Due to the disparty between the rulings of the circuits, this Court should grant certiorari to resolve this conflict. The State respectfully submits that the District Court applied the correct standard when it ruled that the request was a general one and that the

reasonable doubt test of Agurs should apply.

PROPOSITION II

USE OF THE "MIGHT HAVE AFFECTED" STANDARD OF AGURS BY THE TENTH CIRCUIT IN THE PRESENT CASE SET AN UNREALISTICALLY HICH STANDARD FOR THE STATE TO OVERCOME IN ASSESSING WHETHER THE DEATH PENALTY SHOULD HAVE BEEN IMPOSED WHEN VIEWED IN THE CONTEXT OF THE ENTIRE CASE.

Since the State contends that the discovery request in the present case was general in nature, it also submits that the Court erred in applying the "might have affected" standard to the evidence which supported the imposition of the death sentence. Furthermore, use of the "might have affected" standard as applied in the present case presents an insurmountable burden for the State to overcome on appeal.

The Court held that the withheld evidence "'might have affected' the

jurors, or one of them, in deciding on the death penalty" 730 F.2d at 1352; A. 87). Therefore, the test, as it now stands, for review of a death sentence imposed in Oklahoma when any evidence has been withheld after a defense attorney has made a request for all "statements," is whether the withheld evidence "might" have affected the decision of even one juror.[7]

The State contends that this imposes an unrealistically high barrier to the imposition of the death penalty and goes considerably farther than was contemplated by the Supreme Court in the United States v. Agurs, 427 U.S. 97 (1976) decision, especially when applied

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[7] Oklahoma requires a unanimous jury verdict in imposing the death penalty. Okla. Stat. tit. 21, § 710.10.

to death penalty cases.[8] The State also submits that the Tenth Circuit, despite its denial, has in fact decided that "the Eighth and Fourteenth Amendments guarantee defendants an absolute right to obtain mitigating evidence held by the prosecutor." 730 F.2d at 1352, n. 23; A. 23). As a result of the Court's decision, no prosecutor will risk withholding any evidence in a death penalty case for fear that later some court may subjectly decide that "one" juror "might" have been affected by withheld evidence.

Furthermore, it should be remembered that the Supreme Court in Agurs, stated:

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[8] In Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871, 881 (1984), the Supreme Court reiterated that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'"

> "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-110.

In Cramer v. Fahner, 683 F.2d 1376, 1383 (7th Cir. 1982), it was held:

> "It would be 'far too restrictive on the state[s]' for a habeas court to vacate a state conviction simply because suppressed evidence, such as a police report 'might have led the jury to entertain a reasonable doubt as to his guilt.'" (Emphasis added).

Additionally, a jury verdict is not constitutionally required in imposing the death penalty. Spaziano v. Florida, ___ U.S. ___, 52 U.S.L.W. 5030, 5033-5035 (U.S. July 2, 1984); Proffitt v. Florida, 428 U.S. 242, 252 (1976). Since a unanimous jury verdict (or even a jury verdict) is not constitutionally required, this too should be taken into consideration before a death sentence

imposed by a state, pursuant to a statutory system enacted by elected officials, is set aside by the federal judiciary.

The State in the present case contends that the Court, for the reasons stated above, should have applied the "reasonable doubt" standard of Agurs in determining whether the death penalty should have been imposed.[9] Therefore, reviewing all the facts of the case, the omitted evidence would not have created a reasonable doubt as to the imposition of the death penalty that otherwise would not have existed. United States v. Agurs, supra, 427 U.S. at 112.

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[9] The "reasonable doubt" standard is also consistent with the Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979).

The defendant's involvement in the kidnapping and subsequent murder of Mrs. Ashmore and Ms. Brown was so extensive that even if other individuals were involved (a contention seriously undermined by the defendant's repeated refusal to call any of the principal witnesses referred to in the FBI reports) that when viewed in the context of the entire record, a reasonable doubt does not exist as to the appropriateness of the imposition of the death penalty by the jury. The record conclusively establishes that the defendant, at a minimum, contemplated that life would be taken. Enmund v. Florida, 458 U.S. 782, 801 (1982).

For example, the remarks made over the telephone to Mr. Ashmore, contain horrifying threats concerning the life of Mrs. Ashmore. Furthermore, the act

of kidnapping for ransom itself is a crime in which a participant could reasonably foresee that the victim's life would be taken by an accomplice.

Since the record in the present case reveals the overwhelming nature of the Defendant's direct involvement in the kidnapping and murder of Mrs. Ashmore, an independent review of the nondisclosed reports and the subsequent hearings on such, support the view that any nondisclosed evidence would not "create a reasonable doubt that would not otherwise exist," particularly when "evaluated in the context of the entire record." Agurs, supra, 427 U.S. at 112.

The State contends that the Federal District Court was correct in noting that it was significant that the Defendant's attorney did not call or propose to call Ms. Weaver, Mr. Hamilton or Kyle

West the witnesses referred to in the FBI reports, at either the State evidentiary hearing or the requested federal evidentiary hearing. (Order of June 23, 1983, p. 5; Order of June 30, 1983, p. 27).

Therefore, the Tenth Circuit erred when it determined that the death penalty should not have been imposed in the present case.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant certiorari and reverse the judgment of the United States Court of Appeals for Tenth Circuit with respect to the setting aside of the death penalty in the present case.

Respectfully submitted,

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,
Petitioner,
v.
LARRY LEON CHANEY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LARRY LEON CHANEY, Petitioner-Appellant,	)	
vs.	)	No. 83-1862
JOHN N. BROWN, Warden Oklahoma State Penitentiary, McAlester, Oklahome, Respondent-Appellee.	)	

Before Holloway, Barrett, and Logan, Circuit Judges

HOLLOWAY, Circuit Judge

Petitioner Larry Leon Chaney was convicted by a jury of murder in the first degree and the jury recommended a death sentence which was imposed in the

District Court of Tulsa County, Oklahoma. Chaney appeals the denial of his petition for a writ of habeas corpus by the United States District Court for the Northern District of Oklahoma, arguing that (1) the prosecutor wrongfully withheld exculpatory evidence that was material both as to guilt or innocence and to punishment; (2) the prosecutor's withholding of evidence that persons other than Chaney may have been involved deprived Chaney of the opportunity to persuade the jury that he himself did not actually kill the victims, and therefore the death sentence must be vacated in light of Enmund v. Florida, 458 U.S. 782 (1982); and (3) the federal district court erred in denying Chaney an evidentiary hearing in connection with his habeas petition.

This case presents for the first time the interplay of three doctrines: (1) a prosecutor's duty to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976); (2) a defendant's constitutional right under Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), and Eddings v. Oklahoma, 455 U.S. 104 (1982), and other cases, to present mitigating evidence before a death sentence is imposed; and (3) the requirement that a defendant kill, attempt or intent to kill, or contemplate that life would be taken, before a death sentence is imposed, consistently with Enmund.

We hold that the federal district court improperly ruled that Chaney made only a general pretrial Brady request

for exculpatory evidence. The court therefore applied the incorrect legal standard under Agurs in reasoning that the withheld evidence did not create a reasonable doubt as to Chaney's conviction or sentence. We hold that Chaney made a specific Brady request.

Although we conclude that the withheld evidence would not have affected Chaney's murder conviction, we are convinced that this death sentence cannot constitutionally stand in light of the withholding of the evidence. Under the correct standard applicable where a specific Brady request is made, see Agurs, 427 U.S. at 104, the withheld evidence "might have affected" the choice of the death sentence instead of life imprisonment by its effect on the jury, or at least one of the jurors,

who made the aggravating circumstances findings that Chaney himself committed the murder and that these aggravating circumstances were not outweighed by one or more mitigating circumstances.

The factual background of the kidnappings and murders

The evidence presented by the State at Chaney's trial, considered in the light most favorable to the guilty verdict, tended to show the facts as follows:

During March 1977, Phillip Ashmore was engaged in the construction business. He and his wife, Kendal Ashmore, also raised Morgan horses at their farm residence in Jenks, Oklahoma. Kathy Ann Brown worked for the Ashmores in that business.

For approximately one month prior to March 17, 1977, a man who identified himself as Richard Elliott had been calling the Ashmore residence and asking Mrs. Ashmore to give him an estimate of the value of some Morgan horses. On

March 12, the man called and made an appointment to come to the Ashmore home the next day. He did not keep the appointment but later called Mrs. Ashmore and explained that he could not find their home. He arranged to meet Mrs. Ashmore at 91st Street and Memorial Avenue in Tulsa, Oklahoma at 1:00 p.m. on March 17. VI R. 875-79; I R. 234.[1]

On March 17, Mrs. Ashmore and Ms. Brown came to Mr. Ashmore's office in Tulsa at 9:30 a.m. to pick up the family's blue and white pickup truck. After returning home at 6:00 p.m., Mr. Ashmore received the first of three extortion calls. The caller indicated

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[1] The record on appeal consists of ten volumes. Volume I through III were labeled as such. We have numbered the remaining volumes in chronological order, beginning with Volume IV.

that Mr. Ashmore's wife and their employee had been kidnapped and that they would be returned safely if Mr. Ashmore paid $500,000. The caller said that he would phone again the next night. Mr. Ashmore then called his attorney, who contacted the Federal Bureau of Investigation. The FBI affixed a recording device to the Ashmores' telephone. VI R. 337-54; I R. 236-38.

At 6:53 p.m. on March 18, Mr. Ashmore received a call from a person with the same voice as the caller from the previous night. The caller directed Mr. Ashmore to leave the money at a rodeo ground in Jenks by 7:30 p.m. or his wife would be killed. The caller also told Mr. Ashmore that his truck was at 91st Street and Memorial Avenue in Tulsa. The call was traced to the telephone at

Chaney's residence in Jenks. VI R. 361-63, 418-19; I R. 239-41.

After Mr. Ashmore delivered the money to the rodeo ground, he received another call at 9:27 p.m. from a man with the same voice as the man who had telephoned earlier. The caller told Mr. Ashmore that he had not left the money at the right spot and directed that Mr. Ashmore return to the rodeo ground to pick up the money. The caller indicated that he would phone Mr. Ashmore the next day. The call was traced to a service station telephone booth at 61st Street and Yale Avenue in Tulsa. Chaney's palmprint was taken from the receiver handle of the telephone about three hours later. VI R. 365-73, 424-25, 428, 452; I R. 241-42.

The police arrested Chaney at 3:30 a.m. on March 19 at his Jenks home, which was within two miles of the rodeo grounds where the ransom money was to be delivered. Chaney's fingerprints were found on a torn-up piece of paper in a waste basket in his kitchen. When reassembled, the note contained the words "Richard Elloit" [sic], "1:00 p.m.," and "Thursday," and the numbers "299-9791" and "9148." Richard Elliot was the name given by the man who had called about valuing horses and had arranged to meet with Mrs. Ashmore at 1:00 p.m. on March 17 at 91st Street and Memorial Avenue. The numbers matched the Ashmores' home telephone number and street address. A handwriting expert testified that Chaney made the notations on the torn pieces of

paper. VI R. 397, 579, 588-89, 1199; I R. 242-43.

The Ashmores' pickup truck had been found at 91st Street and Memorial Avenue at 9 a.m. on March 18, the location the caller indicated in the call at 6:53 p.m. on March 18. A note written on half of a piece of paper in Mrs. Ashmore's handwriting was found in the pickup. The note contained the words "1:00 Thur., 91st and Memorial" and "Richard Eliot," [sic] and the numbers "581-3106" and "352." The other half of the piece of paper was found in the Ashmores' home. VI R. 468-71, 588-89; I R. 238.

The body of Mrs. Ashmore was found on March 22 at 12:45 p.m. in a shallow grave on a tract of land being leased by Chaney near Sallisaw, Oklahoma, approx-

imately 100 miles southeast of Tulsa. Although the size of the tract is not given in the record, it is apparent that it was not small since the witnesses testified that there was a stream or creek in a valley, and that a gravel road ran through the property. VI R. 715-16. Mrs. Ashmore had been strangled with a strip of towel and was found gagged, with her hands tied behind her back. VI R. 719-27; I R. 243. The State's evidence tended to indicate that her death occurred on March 17. Deputy Sheriff Lee of Tulsa County testified that the soil of the grave in which Mrs. Ashmore's body was found, and a heel-print found on the soil, were indicative of rainfall. VI R. 723-24, 735-36; I R. 243. The parties stipulated that the only rain which fell in the Sallisaw

area from March 17 through 22 occurred between 7:00 a.m. March 17 and 7:00 a.m. March 18. VI R. 711-12; I R. 243. Dr. Hoffman, the Assitant Chief Medical Examiner for the State, performed an autopsy on March 23. He testified that his findings were consistent with March 17 as the date of Mrs. Ashmore's death. VI R. 832, 854-55, 871; I R. 243.

Two witnesses testified that they observed Chaney on March 17, at 4:30 p.m., walking on his property near the area where Mrs. Ashmore's body was found. VI R. 671-75, 677, 685-89; I R. 237. Another witness testified that he observed Chaney between 3:00 p.m. and 5:00 p.m. on March 17 using a telephone in a convenience store owned by the witness near Sallisaw. The witness testified that Chaney had dirt stains on his

pants from the knees down. VI R. 691-97; I R. 237. Telephone records indicated that a telephone call made from the convenience store at 4:39 p.m. was charged to Chaney's residence. VI 793; I R. 237. The person to whom the call was made confirmed that he received the call from Chaney. VI R. 642-43; I R. 237-38.

Chaney did not take the stand. He called a number of witnesses, including several who testified that he had a non-violent reputation. VI R. 930, 934, 936. Chaney also called a pathologist who testified that the autopsy protocol was most consistent with March 21 or 22 as the date of death. Id. at 1045; I R. 244 n.3.

The jury found Chaney guilty of murder in the first degree under Okla. Stat. Ann. tit. 21, § 701.7. IV R. 196; VI R. 1235.

A preceeding was then conducted before the same jury to determine the sentence to be imposed. Id. tit. 21, §§ 701.9A,[2] 707.10. The State introduced evidence that Ms. Brown, the horse trainer who worked for the Ashmores, also had been found bound, gagged and strangled in the same grave where Mrs.

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Section 701.9A provides that:

> "A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Okla. Stat. Ann. tit. 21, § 701.9A (West 1983).

Ashmore's body was found. VI R. 1251-63. Chaney's counsel offered mitigating evidence and argued that life imprisonment was the appropriate punishment. He contended that Chaney "did not commit the actual specific act of murder, and for such reason does not deserve the penalty of death." Id. at 1264. His closing argument stressed the involvement of at least one other person in the killings. Id. at 1274-76. He also introduced a stipulation concerning Chaney's heroic rescue of a man from a burning truck about a month and a half before the kidnappings. Id. at 1264-66.

After deliberating for two hours, id. at 1288-89, the jury unanimously recommended that Chaney be sentenced to death, and pursuant to Okla. Stat. Ann. tit. 21 § 701.11, found all four of the

statutory aggravating circumstances argued by the State to be present. See infra note 24. The state trial judge imposed a death sentence. VII R. 2-8. See also IV R. 144-46.

On direct appeal, the Oklahoma Court of Criminal Appeals affirmed Chaney's conviction and sentence of death. Chaney v. State, 612 P.2d 269 (Okla. Cr. 1980).[3] The Supreme Court denied certiorari. Chaney v. Oklahoma, 450 U.S. 1025 (1981). After two unsuccessful state court applications for post-conviction relief.[4] Chaney petitioned the

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[3] The Court of Criminal Appeals also held that because "the trial court erred in denying the defendant's motion to consolidate and that the prosecution should have consented to the consolidation, . . . the state is estopped from prosecuting the remaining murder charge [of Ms. Brown] and the two kidnapping charges." Chaney v. State, 612 P.2d 269, 282 (Okla. Cr. 1980). The court,

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[3] (Continued) however, also held that "if for any reason this case must be remanded for a new trial for the murder of Mrs. Ashmore, the State will no longer be estopped from prosecuting, nor the judge from consolidating, all four cases." Id. at 283.

[4] The District Court of Tulsa County denied Chaney's application for post-conviction relief under Okla. Stat. Ann. tit. 21, § 1080. Chaney v. State, No. CRF-77-756 (July 27, 1981, I R. 36-40. The Oklahoma Court of Criminal Appeals affirmed. Chaney v. State, No. PC-81-345 (Okla. Cr. Nov. 12, 1981), I R. 42-43. The Supreme Court denied certiorari. Chaney v. Oklahoma, 456 U.S. 919 (1982).

The United States District Court for the Northern District of Oklahoma dismissed Chaney's first habeas petition for failure to exhaust state remedies. Chaney v. Oklahoma, No. 82-C-625-B (N.D. Okla. June 25, 1982). The District Court of Tulsa County denied Chaney's second application for post-conviction relief. Chaney v. State, No. CRF-77-756 (Aug. 9, 1982), I R. 44-53. The Oklahoma Court of Criminal Appeals affirmed. Chaney v. State, No. PC-82-487 (Okla. Cr. Feb. 3, 1983), I R. 54-58. The Supreme Court denied certiorari and a stay of Chaney's execution. Chaney v. Oklahoma, ___ U.S. ___, 51 U.S.L.W. 3872 (U.S. June 7, 1983).

United States District Court for the Northern District of Oklahoma for an evidentiary hearing and a writ of habeas corpus. The district court denied Chaney's application for an evidentiary hearing and his petition for the writ. I R. 126-39, 232-323. The court concluded that Chaney's state trial counsel made only a general pretrial request for exculpatory evidence and that, under the due process standard applicable to such general requests, the withheld evidence did not create a reasonable doubt as to Chaney's conviction or death sentence.

This appeal by Chaney challenges the federal district court's denial of an evidentiary hearing and the denial of habeas relief.[5] We issued a stay of

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[5] The district court certified that there is probable cause for appeal under 28 U.S.C. § 2253. I R. 328.

executon pending this appeal. Chaney v. Brown, 712 F.2d 441 (10th Cir. 1983) (per curiam).

As we will discuss in detail, we find the controlling issue in the case to be whether evidence withheld by the prosecution after receiving a Brady request might have affected the jury's recommendation of the death penalty. In reaching our conclusion that the death penalty cannot constitutionally stand because the withheld evidence might have affected the jury's determination, we discuss the questions that underlie this conclusion, explaining that: (1) the pretrial request by Chaney for exculpatory or favorable evidence was specific so that under Agurs the constitutional test to determine the materiality of the withheld evidence is whether the evi-

dence "might have affected" the verdict of guilt, or the punishment imposed; (2) in determining whether the withholding of evidence denied Chaney due process, the state courts' determination are not factual findings carrying a presumption of correctness under 28 U.S.C. § 2254 (d); this determination is a mixed question of fact and law open to review by the federal courts; (2) considering the record as a whole in connection with the withheld evidence, we are convinced that the withheld evidence would not have affected the determination of Chaney's guilt; and (4) considering the record as a whole in connection with the nondisclosed evidence, we must hold that the cumulative impact of the withheld evidence might have affected the jury's determination on the death penalty so

that this death sentence cannot constitutionally stand.

I

The Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87 (1963) that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The elements of a Brady violation are "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

Although "[t]here is no constitutional right to discovery in a criminal case, and Brady did not create one,"

Weatherford v. Bursey, 429 U.S. 545, 559 (1977),[6] due process is violated if requested evidence is suppressed "where the evidence is material as to guilt or to punishment." Brady, 373 U.S. at 87. See also Agurs, 427 U.S. at 104, n.10; Moore, 408 U.S. at 794.

The question of the materiality of evidence in the prosecutor's control arises in "three quite different situations." Agurs, 427 U.S. at 103. First, where the prosecutor has knowingly used perjured testimony, the judgement must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 103-04. Second, where

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[6] See also Agurs, 427 U.S. at 106; Moore, 408 U.S. at 795.

defendant has made a specific pretrial request for exculpatory evidence, the judgment must be set aside if "the suppressed evidence might have affected the outcome of the trial." Id. at 104 (emphasis added); see id. at 104-06. Third, where defendant has made "a general request for Brady material," or has made no request at all, the judgment must be set aside "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112 (emphasis added); see id. at 106.14.[7]

A. Chaney's Brady request

Chaney filed a motion to produce on April 1, 1977, five months before his

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[7] See also Talamante v. Romero, 620 F.2d 784, 787-89 (10th Cir.), cert. denied, 449 U.S. 877 (1980); United States v. Jackson, 579 F.2d 553, 559 (10th

trial. I R. 59-62. In the opening paragraph of his motion, Chaney requested essentially all material which might be favorable or exculpatory, affect the determination of his guilt or innocence, or reduce punishment. Id. at 59. The motion then specified "that disclosure and production of said material include[s], but [is] not [to] be limited to, the following" material

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[7] (Continued) Cir.), cert. denied, ___ 439 U.S. 981 (1978). For other cases in which we have applied the Agurs formula, see United States v. Montoya, 716 F.2d 1340, 1346 (10th Cir. 1983); United States v. Behrens, 689 F.2d 154, 158 (10th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 513 (1982); United States v. Shoels, 685 F.2d 379, 384 (10th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3117 (1983); United States v. Winner, 641 F.2d 825, 833-34 (10th Cir. 1981); United States v. Alberico, 604 F.2d 1315, 1318-19 & n.10 (10th Cir.), cert. denied, 444 U.S. 992 (1979).

set forth in fifteen paragraphs, including:

> 1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case, [8] . . . .
>
> 2. Stenographic recordings or transcriptions of any oral statement made by any person to an agent of the State, an investigator or police offcer at the Tulsa Police Department, a member of the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the subject matter of this case, [9] ....

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[8] Chaney requested these statements:

> whether or not the State intends to call them to testify at trial, and whether or not,
>
> (a) The statement, if in writing, has been signed or approved by the witnes.

. . . .

4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

. . . .

8

(b) The statement relates to the proposed subject matter of the witness to be called at trial.

(c) The statement is merely a summary of the facts related to the interviewer. IV R. 16.

9 Chaney requested these stenographic recordings or transcriptions:

whether or not,

(a) the stenographic recordings or transcriptions are a substantially verbatim recital of the statement, or

(b) the statement was recorded contemporaneously with its making, or

(c) the statement relates to the proposed subject matter of the testimony of the witness to be used at trial. Id. at 17.

> 13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement official.

Id. at 59-60 (emphasis added). In response to Chaney's motion, the District Court of Tulsa Ordered that the State produce, among other things (such as Chaney's statements), the following:

> Any and all other evidence now in the custody of the District Attorney's office, the Tulsa Police Department, the Tulsa County Sheriff's office, the Federal Bureau of Investigation, the State Crime Bureau for the State of Oklahoma, or any other agency of any State or Federal government, which may be favorable to the Defendant or is exculpatory.

IV R. 78-79 (emphasis added).

The state trial court did not expressly decide whether the pretrial Brady motion was general or specific. In denying the post-conviction application, however, the court's July 27, 1981

order applied the Agurs standard applicable to general Brady requests and held that the withheld FBI reports did not create a reasonable doubt as to Chaney's guilt.

In its November 12, 1981 order affirming the denial of post-conviction relief, the Oklahoma Court of Criminal Appeals did not apply the due process standards announced in Agurs, and did not discuss whether the request was general or specific. The Court of Criminal Appeals cited only Brady, and concluded that the withheld evidence was not material as to guilt or punishment. The court stated that even if the withheld evidence is viewed favorably to Chaney, it "does not tend to exculpate him. Instead it merely tends to suggest that the appellant was not the only person

involved in the kidnappings and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders." I R. 42.

In the instant habeas proceeding, the federal district court stated that "Petitioner's motion to produce appears to fall in the third category as a general request for Brady material." Id. at 260.

B. Characterization of Chaney's Brady request under Agurs

The Supreme Court discussed the distinction between general and specific Brady requests in Agurs. The Court stated that a general request "really gives the prosecutor no better notice than if no request is made." 427 U.S. at 106-07. As a result, the Court held

that for purposes of applying the reasonable doubt test, "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." Id. at 107. In contrast, a specific request gives "the prosecutor notice of exactly what the defense desired." Id.[10]

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[10] The determination of the proper standard to be applied under Agurs is not a "factual" finding to which the presumption of correctness of 28 U.S.C. § 2254(d) applies; this presumption does not apply to legal questions or mixed questions of law and fact. See, e.g., Marshall v. Lonberger, ___ U.S. ___, ___, 51 U.S.L.W. 4113, 4116 (U.S. Feb. 22, 1983); Sumner v. Mata, 455 U.S. 591, 597 & n.10 (1982); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Griffin v. Winans, 684 F.2d 686, 688-89 (10th Cir. 1982); Hunt v. Oklahoma, 683 F.2d 1305, 1309 (10th Cir. 1982); United States ex rel Cosey v. Wolff, 682 F.2d

As noted, Chaney's pretrial motion to produce opened with references to material which was favorable or exculpatory as to guilt or punishment, and then pointed to the items requested. Although we discuss the exculpatory nature of the evidence in Parts III and IV, infra, we note here that the state trial judge sustained Chaney's motion in part and ordered that the State produce, among other things, evidence in the custody of the District Attorney's office or the FBI "which may be favorable to the Defendant or is exculpatory." IV R. 78-79.

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10 (Continued) 691, 693 (7th Cir. 1982). Moreover, as noted above, neither the state trial court nor the state Court of Criminal Appeals made any written findings on the character of defendant's Brady request and did not expressly rule on, or discuss, whether the request was general or specific. See Part II, infra.

Chaney's pretrial motion to produce included fifteen paragraphs which explained the type of exculpatory evidence requested. Paragraph 1 requested "[s]tatements of all persons who have been interviewed by . . . an investigator or member of . . . any other governmental agency in connection with the subject matter of this case." I R. 50. Paragraph 2 requested "[s]tenographic recordings or transcriptions of any oral statement made by any person to . . . a member of any other governmental agency in connection with the subject matter of this case." Id. at 59-60. Paragraph 4 requested "[t]he names and addresses of all persons who may have some knowledge of the facts involved in the instant case." Id. at 60. Paragraph 13 requested "[a]ny and all oral statements

made to any . . . law enforcement official." Id. at 61.

Here, all four of the withheld FBI reports contain statements made to the FBI by witnesses. Moreover, three of the reports contain the legend "date of transcription." The statements in the four FBI reports thus clearly are covered by Chaney's Brady request. His request therefore gave the prosecutor "notice of exactly what the defense desired" under Agurs. Indeed, it is difficult to imagine how Chaney could have requested the reports with greater specificity without knowing the identity of three of the witnesses whose statements were included in the FBI reports. The State conceded at oral argument before us that in such a situation "[i]t may not be possible to be more specific"

in formulating a Brady request, but contended that "it may be that this kind of request can always be considered general." Transcript of Oral Argument at 27-28. We disagree and hold that the request is specific because it gave the prosecutor "notice of exactly what the defense required" under Agurs, and because it was formulated in terms as specific as possible in the circumstances.

Our holding that Chaney made a specific Brady request is supported by Agurs and other decisions. The Court in Agurs explained that general requests merely ask for "all Brady material" or for "anything exculpatory." 427 U.S. at 106-07. Chaney's request is more specific than Brady requests that courts have held to be general. For example, the Ninth Circuit recently held that a

request for "all evidence known to the State which may prove the defendant's innocence" constitutes a general request. Hilliard v. Spalding, 719 F.2d 1443, 1445 (9th Cir. 1983).[11]

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[11] Other examples of general Brady requests include requests for "all information and evidence which would tend to exculpate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment," United States v. Cody, 722 F.2d 1052, 1062 n.1 (2d Cir. 1983) (Second Circuit held that this request, taken either separately or together with request for documentary evidence with respect to any informant or accomplice that Government intended to call at trial was not a specific request in connection with alleged verbal threats against Government witness); "detailed boiler plate requests for any and all exculpatory evidence," United States v. Martorano, 663 F.2d 1113, 1114 (1st Cir.), cert. denied, ___ U.S. ___, 103, S.Ct. 1249-50 (1982); requests for "all statement and any other evidence contained in police report[s] or County Attorney's files or Sheriff's files which are exculpatory in nature," Scurr v. Niccum, 620 F.2d 186, 188 (8th Cir. 1980) (Eighth Circuit held that "we agree with the state that the language of the defense request is too broad, by

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[1] 11 (Continued) itself, to constitute a specific request." Id. at 190.); request for "all material known by the government . . . which is exculpatory in nature or favorable to the defendant, or may lead to the discovery of exculpatory material or material which may be used to impeach prosecution witnesses," United States v. DiCarlo, 575 F.2d 952, 959 (1st Cir.), cert. denied, 439 U.S. 834 (1978) (First Circuit termed this "a classic example of non-specific request as defined in Agurs." 575 F.2d at 959 (referring to Brady request in United States v. McCrane, 527 F.2d 906, 910 (3d Cir. 1975), vacated, 427 U.S. 909 (for reconsideration in light of Agurs)), aff'd, 547 F.2d 204 (3d Cir. 1976). On reconsideration, the Third Circuit treated the request as specific because the Government had conceded that it was specific. United States v. McCrane, 547 F.2d 204, 208 (3d Cir. 1976).).

Additional examples of general requests include requests for "any other material in the possession of the Government bearing adversely on the credibility, character and reputation of [a particular Government witness]; and . . . any other material relating to any matter which defense counsel could properly use in the possession of the Government bearing adversely on the credibility, character and reputation of (a particular Government witness); and . . . any other material relating

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[11] (Continued) to any matter which defense counsel could properly use in cross-examination to inquire into [the witness's] motive and bias in favor of the Government or expectation of favor from the Government," Ostrer v. United States, 577 F.2d 782, 786 (2d Cir. 1978) (Second Circuit held that "[t]his request amounted to nothing more than a boilerplate" general Brady request.), cert. denied, 439 U.S. 1115 (1979); requests for "[a]ll books, papers, documents, photographs, tangible objects, buildings or places in the control or possession of the Government which are material to the defense or intended for use by the Government in its case in chief or any such item obtained from the Defendant," United States v. Anderson, 574 F.2d 1347, 1351, 1352-56 (5th Cir. 1978).

Further examples of general requests include requests for "[i]nformation relating to material inconsistencies between statements given by any person, whether or not he is a prospective Government witness, and information relating to material inconsistencies between two or more persons, whether or not they are prospective government witnesses," United States v. MacKay, 571 F.2d 376, 388-89 (7th Cir. 1978); requests for "all evidence favorable to [defendant]

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11 (Continued) under the authority of Brady, including all information regarding police records, arrests, convictions, and any deals, promises or communications with Government witnesses regarding benefits they may receive or have already received for testifying against defendant," United States v. Lasky, 548 F.2d 835, 839 & n.2 (9th Cir.), cert. denied, 434 U.S. 821 (1977) (citation omitted) (Ninth Circuit treated this as a general request for "all Brady and Giglio materials." 548 F.2d at 839 & n.2. See Gigilo v. United States, 405 U.S. 150 (1972) (due process requires new trial when evidence discovered that Government failed to disclose alleged promise of leniency made to its key witness in exchange for his testimony)); and requests for "[a]ny and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the plaintiff's evidence or which arguably could lead to such records of [sic] information." United States v. Boffa, 513 F.Supp. 444, 501 (D. Del 1980). See also United States v. Mangieri, 694 F.2d 1270, 1288 (D.C. Cir. 1982) (When only evidence of Brady request was prosecutor's statement that "[w]e have an understanding, of course, that in the event that other [exculpatory] documents turn up . . . I will turn them over," court held that this is, "at best, a general request.").

Courts have held that Brady requests analogous to Chaney's motion constitute specific requests. For example, in Agurs the Court explained that the request in Brady "to allow [defendant] to examine [his named accomplice's] extrajudicial statement," 373 U.S. at 84, was a specific request. 427 U.S. at 104.[12]

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[12] We have held that when a defendant "ask[s] the prosecutors whether [a government rebuttal witness] had been offered immunity," this constitutes a specific request. United States v. Montoya, 716 F.2d 1345-46 (10th Cir. 1983).

Other courts have held that the following requests constitute specific requests: "general request[s] for 'all exculpatory evidence' [that specifies] that it included 'all information available concerning the past and present mental condition of [a specific witness,'" King v. Ponte, 717 F.2d 635, 639-40 (1st Cir. 1983); requests for "'full and complete statement[s] of all promises, rewards, and/or inducements of any kind made by the government . . . to induce or encourage the giving of testimony or information and made to

12 (Continued) . . . any prospective witness whom the Government intends to call at the trial . . .' and for '[a]ny evidence which may be used to impeach or discredit any witness the government intends to call at the tial . . ., particularly, but not exclusively, inconsistent statements of a witness or between witnesses,'" United States v. Flaherty, 668 F.2d 556, 587 (1st Cir. 1981); requests for "information on the victim's criminal record, including his FBI rape sheet," Briggs v. Raines, 652 F.2d 862, 863, 865 (9th Cir. 1981); and requsts "for the rap sheet of the deceased," Martinez v. Wainwright, 621 F.2d 184, 185 n.1 (5th Cir. 1980).

In addition, the Eighth Circuit held that the following coloquy between the court and counsel at a hearing on defendant's motion to produce transformed a general request for "all statements and any other evidence contained in police report[s] or County Attorney's files or Sheriff's files which are exculpatory in nature" into a specific request:

> THE COURT: I assume anything exculpatory will include any evidence you might have had that someone else had done it. In other words, it might be anything that tends to be exculpatory as to this Defendant is, I assume, what they have in mind.

12 (Continued)

[DEFENSE COUNSEL]: This was intended by the defendant when he filed this, including any statements that were furnished by [defendant's accomplice] here, or police reports that involved the obtaining of this information from [the accomplice].

THE COURT: * * * I assume that that includes oral as well as any written statements.

[DEFENSE COUNSEL]: It was intended to include both, sir.27

Scurr v. Niccum, 620 F.2d 186, 188, 190 (8th Cir. 1980). The Eighth Circuit explained that:

> [A] request for disclosure of particular information cannot be labeled as either 'specific' or general in a vacuum. Rather, the question must be asked whether, under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense desired. In other words, 'specificity' is a function of several factors, including the literal language of the defense

Moreover, other courts have stated that the Agurs standard applied to specific requests should be used when there is uncertainty concerning the characterization of a request. See United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978) (cited in King v. Ponte, 717 F.2d 635, 640 (1st Cir. 1983)). We feel this rule is especially appropriate in a death penalty case.

United States v. Gaston, 608 F.2d 607 (5th Cir. 1979), supports our holding that Chaney made a specific pretrial Brady request. In Gaston, the

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12 (Continued) request itself, the apparent exculpatory character of the evidence sought, and the reasonableness of the explanation, if any, for which the evidence was not exposed or was not considered to be material by the prosecutor.

Id. at 190.

defendant at trial,[13] during a bench conference and subsequent recess, "requested any prior statements of witnesses who had testified, including any interview reports prepared by the FBI agents who investigated the case on FD-302 forms (commonly called 302s), to which he might be entitled under the Jencks Act, 18 U.S.C. § 3500,[14] or under Brady." 608 F.2d at 610 (empha-

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13 In United States v. Montoya, 716 F.2d 1340, 1346 n.5 (10th Cir. 1983), we observed that "[i]n Agurs, the request for information came before trial. We see no reason why [a] request made during trial . . . should be treated differently."

14 In Jencks Act, which codifies the holding in Jencks v. United States, 353 U.S. 657 (1957), requires production, upon motion of the defendant, of any statement within the scope of the subject matter of the direct examination of a government witness who has testified. 18 U.S.C. § 3500(b).

sis added). The Fifth Circuit held that this is "not a blanket request . . . but rather is a request for specific documents." Id. at 613. Chaney were similarly requested FBI interview reports; however, in contrast to the situation in Gaston, Chaney's counsel could not limit his request to specific witnesses because the request was made prior to trial and Chaney's counsel did not then know the identity of three of the witnesses interviewed by the FBI.

We are convinced that the pretrial request for favorable or exculpatory investigative interview reports gave the prosecutor "notice of exactly what the defense desired," and therefore was a

specific request under Agurs.[15] The request by motion also must be considered in conjunction with the state trial court's production order, which specified any and all evidence in the custody of the District Attorney's office or the FBI "which may be favorable to the Defendant, or is exculpatory." IV R. 78-79. We hold that Chaney's request is within the parameters of a specific request under the Supreme Court's standards set forth in Agurs.

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[15] To the extent that United States ex rel Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977), cert. denied, 434 U.S. 1088 (1978), is inconsistent with our holding that Chaney made a specific Brady request, we choose not to follow it. In Moore, "the defense requested written statements in the possession of the prosecution, the [city] police chief, or the [city] superintendent of police taken from any witnesses subsequent to the murder." Id. at 292. The Seventh Circuit held that the request

II

We now turn to the contention by the State that the question of the materiality and possible effect of the withheld evidence on the verdicts has been decided by the state courts and that we must presume those determinations to be correct as factual findings under 28 U.S.C. § 2254(d).[16] Brief of Appellee at 14.[17]

We must disagree.

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15 (Continud) "was not specific in our opinion. Instead, it was a request for exculpatory material which should be scrutinized in accordance with the reasonable doubt standard [applicable to general requests] set forth in Agurs." Id. We are convinced for the reasons discussed above, despite the Seventh Circuit's characterization of the request in Moore, that Chaney here made a specific Brady request.

16 Section 2254(d) in pertinent part, provides that in a federal habeas proceeding, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be pre-

The state courts did not make an actual determination on one question which is critical under Brady and Agurs, and which we find controlling here -- whether the withheld evidence might have affected the jury's imposition of the death penalty. The state trial court held that the FBI reports "would not have affected the demonstration of

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16 (Continued) sumed to be correct," unless any of eight exceptions applies. 28 U.S.C. § 2254(d).

17 In the instant habeas suit, the federal district court at pages 29-30 of its opinion stated that a federal court must give state court findings a presumption of correctness pursuant to § 2254(d); it then quoted the state trial judge's statement that the withheld evidence "would not have altered the demonstration of petitioner's guilt beyond a reasonable doubt . . ." The federal judge concluded that the state trial judge's findings are adequately supported by the record and that Chaney has failed to show that his conclusions were erroneous.

[Chaney's] guilt beyond a reasonable doubt at the trial," without discussing the selection of the death penalty. I R. 40. The Oklahoma Court of Criminal Appeals affirmed, and its reasoning in full was stated as follows:

> Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the fact that the prosecutor was acting in good faith in failing to disclose evidence is irrelevant. What matters is whether the evidence is material to guilt or punishment. After examining the exhibits provided by the appellant and the transcript of the post-conviction hearing held in the district court, this Court concludes that the evidence raised was not material.
>
> Even if the appellant's evidence was viewed in the light most favorable to him, it does not tend to exculpate him. Instead, it merely tends to suggest that the appellant was not the only person involved in the kidnappings and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders.

> IT IS THEREFORE THE ORDER OF THIS COURT that the order of the district court denying post conviction relief should be, and same hereby is, affirmed.

Id. at 42-43 (emphasis added). Although the court mentioned materiality as to "guilt or punishment," the court's obvious concern was with exculpation from guilt. The court's reasoning and statement that Chaney in any event was a "principal" ignore the effect of the withheld evidence as mitigating evidence which could have affected the imposition of the death penalty.

The Supreme Court has expressly held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added).

See also United States v. Valenzuela-Bernal, 458 U.S. 858, 868 (1982); Smith v. Phillips, 455 U.S. 209, 219 (1982); United States v. Agurs, 427 U.S. 97, 104 n.10 (1976); Moore v. Illinois, 408 U.S. 786, 794 (1972); United States v. Muse, 708 F.2d 513, 516 (10th Cir. 1983); United States v. Winner, 641 F.2d 825, 833 (10th Cir. 1981); Talamante v. Romero, 620 F.2d 784, 787 (10th Cir.), cert. denied, 449 U.S. 877 (1980); Calley v. Callaway, 519 F.2d 184, 221 (5th Cir. 1975) (en banc) ("Brady requires the disclosure of material evidence favorable in the sense of mitigation or exculpation. . . ."") (emphasis added), cert. denied, 425 U.S. 911 (1976); 3 C. Wright, Federal Practice and Procedure § 557.2, at 355-56 (2d ed. 1982) ("Evidence may be favorable to the defense,

and within the duty to disclose, whether it relates to guilt or to punishment.").

Careful study of the state courts' findings and opinions with "adequate written indicia" demonstrates that there was no actual discussion by the state courts on the issue whether the withheld evidence "might have affected" the imposition of the death penalty. In any event, on this critical issue there are no factual findings "on basic, primary or historical facts" bearing a presumption of correctness under § 2254(d). Cuyler v. Sullivan, 446 U.S. 335, 342 (1980).

Moreover, the determination under Agurs whether the withholding of the evidence might have affected the verdicts so as to infringe due process

rights is not a factual finding to which § 2254(d) applies. As the Fifth Circuit explained in Davis v. Heyd, 479 F.2d 446, 451 (5th Cir. 1973):

> The question of materiality present in cases in which the accused complains of prosecutorial suppression of material evidence is . . . [a] mixed question[ ] of law and fact calling ultimately for a legal determination. . . . and therefore [is] not entitled to a § 2254(d) presumption of validity.

Id. at 451. See also Ruiz v. Cady, 635 F.2d 584, 588-89 (7th Cir. 1980). The § 2254(d) presumption of correctness does not apply to legal questions or mixed questions of law and fact such as whether the nondisclosure of evidence here might have affected the guilt or punishment decisions and thus infringed Chaney's due process rights; the presumption applies only to "basic, pri-

mary or historical facts." Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980). See also Marshall v. Lonberger, ___ U.S. ___, ___, 51 U.S.L.W. 4113, 4116 (U.S. Feb. 22, 1983); Sumner v. Mata, 455 U.S. 591, 597 & n.10 (1982); Griffin v. Winans, 684 F.2d 686, 688-89 (10th Cir. 1982); Hunt v. Oklahoma, 683 F.2d 1305, 1309 (10th Cir. 1982).[18]

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[18] Smith v. Phillips, 455 U.S. 209 (1982), relied on by the State, does not require a contrary conclusion. There, a state court denied a motion to vacate a defendant's conviction of the ground that the prosecution did not disclose evidence that a juror during the trial had applied for employment with the district attorney's office. The state court concluded "beyond a reasonable doubt" that these facts did not influence the verdict. The federal district court issued a writ of habeas corpus on the ground that defendant was the victim of implied bias. 485 F.Supp. 1365, 1371-72 (S.D.N.Y. 1980). The Second Circuit affirmed, but did not discuss whether the defendant was the victim of actual or implied bias. 632 F.2d 1019, 1022 (2d Cir. 1980). Instead, the Second Circuit held that "the failure

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[18] (Continued) of the prosecutors to disclose the knowledge denied [defendant] due process." Id. at 1022. The Supreme Court reversed. After discussing Brady and Agurs, the Court held that prosecutorial misconduct alone does not require a new trial. 455 U.S. at 219-20. The Court held that defendant was not denied a fair trial because the state court had found that the juror's conduct "did not impair his ability to render an impartial verdict." Id. at 220. The Court previously had stated that these state court findings were presumptively correct under § 2254(d). Id. at 218.

The Court in Smith v. Phillips did not hold that the § 2254(d) presumption of correctness applied to determinations of the materiality of withheld evidence under Agurs. Instead, the Court applied the §2254(d) presumption of correctness to the discrete factual determination that the juror's applying for job with the district attorney's office during the course of defendant's trial did not reflect "a premature conclusion as to the [defendant's] guilt, or prejudice against the [defendant], as an inability to consider the guilt or innocence of the [defendant] solely on the evidence." 455 U.S. at 213-14; People v. Phillips, 87 Misc.2d 613, 627, 834 N.Y.S.2d 906, 915 (1975).

This finding in Smith v. Phillips fits within the category of "basic, primary or historical facts" entitled to

In sum, we hold that the issue whether the withheld evidence "might have affected" the guilt and punishment determinations so that due process was denied is an open issue for federal court review; the issue has not been decided by the state courts with findings entitled to a presumption of correctness.

III

We consider now whether the withheld evidence, viewed as a whole, might have affected Chaney's conviction. We consider in Part IV, infra, whether that evidence might have affected the death sentence determination by the jury.

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[18] (Continued) the § 2254(d) presumption. In the instant case, however, the due process issue is clearly a mixed question of fact and law.

A. The withheld evidence

In March 1981, pursuant to a request under the Freedom of Information Act (FOIA) by a Tulsa newspaper, three FBI reports were released. They contained statements made to the FBI during its initial investigation which was conducted within two weeks after the kidnappings. The FBI reports detailed statements of these interviews with Ms. Poppy Weaver, J.C. Hamilton and Kyle West very shortly after the critical events of March 17, 1977. In addition, among other FBI reports released in the fall of 1982 pursuant to a federal court order, there was a statement by Phillip Ashmore.

One of the withheld FBI reports released in March 1981 contains a transcription of a statement made to the FBI

by Ms. Weaver on March 22, 1977, five days after the kidnappings. She said that she saw Mrs. Ashmore at 4:10 p.m. on March 17, 1977, in the Ashmores' blue and white pickup truck with an unidentified man and woman at a grocery store in Jenks, Oklahoma. Ms. Weaver glanced at the parked Ashmore truck, which was some 8 or 9 parking spaces away, with no other vehicles parked between her car and the Ashmores' truck. She saw Mrs. Ashmore under the steering wheel. After she recognized Mrs. Ashmore, Ms. Weaver went in the store and the Ashmores' truck was gone when she came out about 10 minutes later. Jenks is a small community two or three miles south of Tulsa.

Ms. Weaver said that she lived near the Ashmores; that she was acquainted

with Mrs. Ashmore and saw her frequently; and that she was familiar with the Ashmores' truck, which she knew the Ashmores drove. Ms. Weaver also stated that she was certain of the time because she had picked up her son at school at 4:00 p.m. and had driven straight to the store. She said that two firetrucks and two police cars with sirens went by while she was in the store's parking lot. I R. 69-70. As noted below, a stipulation was made at a post-conviction hearing that the Jenks fire department answered a call at 4:08 p.m. on March 17 and that the likely route of the fire truck would have taken it by the grocery store mentioned.

The second withheld FBI report contains a transcription of a statement made to the FBI by J.C. Hamilton on

March 18, 1977, the day after the kidnappings. He made daily trips to pasture rented at 91st Street and Memorial Avenue to tend to his stock. He said that he saw a pickup truck arrive at 91st Street and Memorial Avenue between 8:00 a.m. and 8:30 a.m. on March 18. Hamilton stated that he was postive of the time. He saw the driver of the truck at a distance of about 50 yards and described him as a white male, about 6 feet in height, neither real old nor young, and of slender build. He said that the driver of the truck "passed in front of the parked truck and walked over to a car that was waiting for him." He added that he "did not know if there was another individual in the black car but presumed there was but could not give a description." I R. 65-66. Ham-

ilton said that the parked truck was the one still there at the time of the interview with the FBI agent (which turned out to be the Ashmore truck).

The third withheld FBI report contains a summary of a statement made to the FBI by Kyle West,[19] a Jenks public school student. He stated that between 4:00 p.m. and 4:30 p.m. on March 17, 1977, and again at 5:30 p.m., at 91st Street and Memorial Avenue he saw a "shiny red" pickup truck with a white stripe across it and a 'clip-on' CB an-

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19 Unlike the FBI report containing the Weaver, Hamilton and Ashmore statements, the record containing West's statement does not indicate the date on which West was interviewed. We note, however, that West was interviewed during the course of the FBI's initial investigation from March 17 to April 1; the statement thus was given to the FBI sometime within two weeks after the kidnappings.

tenna on the driver's side. West stated that "this truck was parked on the south side of the Bixby Produce Building, next to it, with the nose of the truck facing west." I R. 67.

The FBI report released during the fall of 1982 contains a transcription of a statement made to the FBI by Phillip Ashmore on March 17 on the events that day. Id. at 71-72. He reconstructed the telephone conversation he had with the caller at 6:30 p.m., recalling that the caller said:

> You listen to me and you listen good. I've got your wife and that Honky that works for you. If your children want to see their mother again, you go down to the bank and get a half a million dollars in one hundred dollar bills and put it in a canvas sack. There are four of us. We're not kidding. If your wife tries anything like that Honky that works for you, we'll do her the same way.

Id. at 72 (emphasis added).

B. The prior proceedings concerning the withheld evidence

On April 3, 1981, before the release of the FBI report containing the transcription of Ms. Ashmore's statement, Chaney filed his application for post-conviction relief under Okla. Stat. Ann. tit. 22, § 1080, in the District Court of Tulsa County. He alleged, inter alia, that the withholding of the FBI reports containing transcriptions of the statements by Weaver, Hamilton and West required that his conviction and sentence be vacated. Chaney's counsel contended that he had made a specific pre-trial Brady request, while the State argued that the request was merely general. IX R. 4, 5.

The State court conducted a hearing on the application on May 1. Chaney's attorney introduced the three FBI re-

ports in evidence, IX R. 37, and called one witness, Mr. Fallis, the Tulsa County District Attorney, to testify. Chaney's attorney stated that he had spoken to Weaver and Hamilton and to West's mother and that he had decided not to call Weaver, Hamilton or West to testify. IX R. 38; II R. 6-7.

The state prosecutor testified that he did not give Chaney's counsel the FBI reports because he did not consider them to be exculpatory. Mr. Fallis said that Ms. Weaver's statement (among other things that Mrs. Ashmore was in the parked Ashmores' blue and white pickup truck with an unidentified man and woman in Jenks at 4:10 p.m. on March 17) was not exculpatory because Ms. Weaver had subsequently said she could not identify Mrs. Ashmore as a person in the truck:

> it is my recollection, she could not with certainty identify this person as being Mrs. Ashmore. As a precaution, based upon having received your notification in this case, she was talked to again by an investigator from my office. He response was, "I couldn't identify the woman now, I can't identify her now." So, again, I find nothing in those reports that is exculpatory.

IX R. 25; see also id. at 26-28, 33-34.

Mr. Fallis testified that the Hamilton statement (that a pickup truck arrived at 91st Street and Memorial Avenue between 8:00 a.m. to 8:30 a.m. on March 18) was not exculpatory because the truck had been discovered thirty minutes to an hour earlier. Mr. Fallis said that the man Hamilton saw emerge from the truck was an employee of Mr. Ashmore. Id. at 24. Mr. Fallis said that the West statement (that a red pickup truck was parked at 91st Street and Memorial Avenue between 4:00 p.m. and

5:30 p.m. on March 17) was not exculpatory because a red pickup truck "has totally no relationship to the case," explaining that the Ashmore pickup truck was blue and white. Id. at 25.

Chaney's counsel argued that the Hamilton and West statements contradicted the State's evidence that the Ashmore pickup truck was abandoned at 91st Street and Memorial Avenue on March 17 before 5:00 p.m. to 6:00 p.m. With regard to the exculpatory nature of Ms. Weaver's statement, he stated that:

> I think the most substantial piece of evidence is obviously contained in [the FBI report of Weaver's statement], which placed Kendall Ashmore in Jenks, Oklahoma at 4:10 in the afternoon of March 17, 1977, 110 miles away, and only an [sic] half hour's time away from [Chaney] unquestionably making a long distance telephone call from Sequoyah, Oklahoma. He certainly cannot be in two placed at one time. . . . I don't care who it was [in the truck with Mrs.

> Ashmore]. Based on the State's own theory of the case, it could not have been [Chaney].
>
> In my opinion, it is extremely exculpatory as to the guilt or the mitigation [of] punishment. It could indicate another individual would have had to be involved. More than likely, another individual actually killed Kendall Ashmore and Kathy Brown.

Id. at 43-44 (emphasis added).

In addition to introducing the FBI reports in evidence at the post-conviction hearing, a stipulation was made and offered that the Jenks fire department responded to a call at 4:08 p.m. on March 17, 1977, and that the fire trucks likely took a route past the grocery store where Ms. Weaver stated in the FBI report that she saw Mrs. Ashmore. IX R. 38-40. This stipulation corroborates Ms. Weaver's statement to the FBI agent that while in the grocery store parking lot at 4:10 p.m. she "recalled [that]

two firetrucks and two police cars with sirens went by." I R. 70.

The state trial judge announced at the May 1981 hearing that he would deny Chaney's application. He stated that "this is one of the strongest cases that I've ever seen as a trial judge as far as evidence against the Defendant is concerned." IX R. 53.

Chaney's counsel sought to reopen his application for post-conviction relief to introduce further evidence. At a July 1981 hearing, he aruged that the FBI reports called Chaney's guilt into question, or at least might have mitigated his punishment. Chaney's counsel also emphasized that since the earlier hearing he had been given the names of the FBI agents who had interviewed the witnesses discussed in the

FBI reports. Chaney's attorney sought to subpoena FBI Agent McLain, who had taken Ms. Weaver's statement. Chaney's counsel stated that he had spoken with Agent McLain, who indicated that "he was absolutely and certainly positive that the written reduction of the oral statement made to him by Poppy Weaver was a true and accurate transmission of what had been said to him." X R. 4. The court denied Chaney's application to reopen the proceedings.

In its order denying Chaney's post-conviction application, the state trial court did not say whether Chaney had made a general or specific request for Brady material. As noted in Part II, supra, however, the court applied the Agurs standard applicable to general Brady requests and held that the FBI

reports "would not have altered the demonstration of [defendant's] guilt beyond a reasonable doubt at trial." I R. 40.

The Oklahoma Court of Criminal Appeals affirmed and, without discussing Agurs, held that "the evidence raised was not material." As noted in Part II, supra, the appellate court's reasoning also focused on the effect of the withheld evidence on Chaney's conviction.

C. The effect on the conviction

The jury found Chaney guilty of murder in the first degree under Okla. Stat. Ann. tit. 21, § 701.7. IV R. 196; VI R. 1235. Section 701.7A provides that "[a] person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that

deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." Okla. Stat. Ann. tit. 21, § 701.7A (West 1983).[20] Section 701.7B provides that "[a] person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of [specific enumerated felonies, including] kidnapping." Id. tit. 21, § 701.7B. We noted in Sanders/Miller v. Logan, 710 F.2d 645, 651 (10th

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20 Oklahoma Law defines homicide as "the killing of one human being by another." Okla. Stat. Ann. tit. 21, § 691 (West 1983). Oklahoma law classifies homicides into four categories: murder, manslaughter, excusable homicide and justifiable homicide. Id. tit. 21, § 692. Section 693 provides that "[n]o person can be convicted of murder . . . unless the death of the person alleged to have been killed and the fact of the killing by the accused are each established as independent facts beyond a reasonable doubt." Id. tit. 21, § 693.

Cir. 1983), that § 701.7B is a "felony-murder section which permits a conviction of first degree murder punishable by death or life imprisonment, regardless of malice, when a life is taken during the commission of specific enumerated felonies."

Chaney's counsel argues that the withheld evidence might have affected his conviction in light of Enmund v. Florida, 458 U.S. 782 (1982). We disagree. In Enmund, the Court held that the death penalty was unconstitutionally imposed "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." 458 U.S. at 801. Enmund does not bar a conviction for murder, absent such proof. The possible involvement of

others in the kidnappings and murders does not call Chaney's conviction for Mrs. Ashmore's murder into question under Enmund. We agree with the Fifth Circuit, which recently held that "Enmund merely invalidates a death penalty when based solely upon a defendant's criminal responsibility for a killing by an accomplice that is unintended or not contemplated by the defendant; it does not invalidate a conviction of a substantive offense of murder when guilt is so based." Skillern v. Estelle, 720 F.2d 839, 846 (5th Cir. 1983).

We are convinced that the withheld evidence would not have affected Chaney's conviction. As to guilt, the state trial judge called this "one of the strongest cases against a criminal de-

fendant that the Court has witnessed as a trial judge." I R. 39. The nondisclosed evidence supports an inference that others were involved in the kidnappings and murders, and that Chaney himself did not commit the murders and was not present at that time. However, we are satisified that the withheld evidence would not have affected a conclusion that Chaney was involved in the felony of kidnapping during which the murder of Mrs. Ashmore was committed.[21]

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[21] As detailed earlier, the circumstantial evidence implicating Chaney in the kidnappings during which the murders occurred includes the following: the second extortion call was traced to Chaney's residence in Jenks; the third extortion call was traced to a public telephone in Tulsa from which Chaney's palmprint was lifted; the voice of the caller in all three calls was said by Mr. Ashmore to have been the same; a note in Chaney's handwriting found in his residence contained the words "Richard Elloit" [sic] (the name given by a caller who had arranged to meet the

Section 701B does provide that one is guilty of felony murder "if he takes the life of a human being, regardless of malice" during the commission of the named felonies, including kidnapping.

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21 (Continued) victim about valuing some Morgan horses at 1:00 p.m. on Thursday, March 17), "1:00 p.m." and "Thursday" (the time and day of the scheduled meeting), "299-9791" (the Ashmores' home telephone number), and "9148" (the street number of the Ashmores' residence); the bodies were found on the tract of land leased by Chaney; a pick-ax found at Chaney's residence contained soil particles consistent with the soil at the gravesite; three terrycloth bath towels were missing from the Sallisaw Motel where Chaney stayed the evening of March 16 (the victims had been bound, gagged and strangled with strips of terrycloth or towel).

Thus the circumstantial evidence of Chaney's involvement in the kidnappings is strong, despite the conflicting inferences and doubts raised by the withheld evidence as to Chaney's being the sole participant in the criminal episode and as to his taking part in the actual murders, or his being present when the murders were committed.

Okla. Stat. Ann. tit. 21 § 701B (West 1983) (emphasis added). Nevertheless, the state trial court at the first stage instructed the jury on the responsibility of an aider and abettor as a principal under Okla. Stat. Ann. tit. 21, § 172. IV R. 156 ("all persons concerned in the commission of crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals"). The court also instructed on the felony murder rule as follows: "[T]he State is not required to prove that the homicide was committed with a deliberate intention, a premeditated design, on the part of the defendant, to kill the deceased. A homicide, although unintended, if committed in the commission of kidnapping constitutes murder in the first

degree." IV R. 159. Considering the theory of responsibility under the aider and abetter statute, together with the Oklahoma felony murder statute, the conviction of Chaney for first degree murder is supported by Oklahoma law and by the strong circumstantial evidence showing Chaney's participation at least as an aider and abetter in the kidnapping, during which Mrs. Ashmore's murder occurred.[22] See Hatch v. State, 662 P.2d 1377, 1381-82 (Okla. Cr. 1983).

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[22] In Skilern, the Fifth Circuit pointed out that a defendant may be convicted of felony murder "under the Texas law of parties and criminal responsibility for the act of a confederate," even though the killing by the confederate occurred in the course of another offense, and was not intended by the defendant on trial. The court found no Fourteenth Amendment barrier to the crime of felony murder. 720 F.2d at 846-47.

We conclude that the withheld evidence would not have affected a determination that Chaney at least was involved by aiding and abetting the kidnapping of Mrs. Ashmore, and liable as a principal for her murder during that felony, even if he did not commit the murder or intend that it occur. Thus, we find no constitutional infirmity in the conviction itself.

IV

Lastly, we reach the critical question whether the withheld evidence "might have affected" the jury's determination on the death penalty.

A.

In recommending that Chaney be sentenced to death, the jury found four aggravating circumstances beyond a reasonable doubt, each of which included the finding that Chaney personally killed

the two victims. Oklahoma law prohibits the imposition of the death penalty unless the jury determines that any aggravating circumstances found are not "outweighed by the finding of one or more mitigating circumstances." Okla. Stat. Ann. tit. 21, § 701.11. In addition, the judge must impose a sentence of life imprisonment "[i]f the jury cannot, within a reasonable time, agree as to punishment." Id.

Oklahoma law also provides that "[i]n the [capital] sentencing proceeding, evidenced may be presented as to any mitigating circumstances." Okla. Stat. Ann. titl 21, § 701.10 (West 1983) (emphasis added). The Oklahoma Court of Criminal Appeals recently stated that "[c]ertainly the degree of participation in the entire chain of events may be presented in mitigation of the degree of

punishment to be imposed." Hatch v. State, 662 P.2d 1377, 1383 & n.4. (Okla. Cr. 1983) (emphasis added).

The Supreme Court has held that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis a sentence less than death.

Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982) (earlier emphasis in original, later emphasis added) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)). See also Bell v. Ohio, 438 U.S. 637, 642 (1978) (plurality opinion); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam) (emphasis added) ("[It] is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either

the particular offender or the particular offense."); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."). See also Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (exclusion of proferred testimony at sentencing phase under state hearsay rule violated due process because testimony went to critical issue in punishment phase and substantial reasons existed to assume its reliability); Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937) ("[J]ustice . . . requires . . . that there be taken

into account the circumstances of the offense together with the character and propensity of the offender.").

We conclude that the withheld evidence might have affected the jury's imposition of the death penalty here for three reasons.

First, the evidence withheld here is mitigating evidence because it relates to the circumstances of the offense as a whole, and tends to support inferences that others were involved in the criminal episode, that Chaney may not have personally killed the victims, and that he may not have been present when they were killed. See Blankenship v. State, 308 S.E.2d 369, 371 (Ga. 1983) (Lockett and Eddings require that defendant be allowed to offer as mitigating evidence in sentencing phase testimony that a third person was involved in murder,

rape and aggravated sodomy). Chaney was unable to offer such evidence in mitigation at the punishment phase of his trial because the prosecutor withheld the FBI reports.[23]

Second, the withheld evidence is significant with respect to the aggravating circumstances in question. The aggravating circumstances found here by the jury to support the death sentence

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[23] Chaney argues that he need not meet either of the Agurs due process standards of materiality because in any event the prosecutor's withholding of the FBI reports violated his Eighth and Fourteenth Amendment right to present mitigating evidence to the jury before a death sentence is imposed. We need not decide whether the Eighth and Fourteenth Amendments guarantee defendants an absolute right to obtain mitigating evidence held by the prosecutor. We conclude that the withheld evidence might have affected Chaney's sentence and thus uphold Chaney's right to obtain the evidence under the Brady and Agurs rationale, without relying on Chaney's separate theory concerning an absolute right to mitigating evidence.

all rest on the conclusion that Chaney himself killed the victims.[24] Because

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[24] The jury found all four of the aggravating circumstances argued by the state to be present:

> 1) the defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2) The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 from the family of Kendal Inez Ashmore.
>
> 3) The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in

the withheld evidence tends to support inferences that Chaney may not have been the sole participant in the criminal episode, and may not have personally killed the victims, or have been present at the time of the murders, the evidence might have caused the jury not to find these aggravating circumstances beyond a reasonable doubt.

Third, we note that the state trial judge instructed the jury at the sentencing phase that among the mitigating circumstances it could consider whether "the defendant was an accomplice in a murder committed by another person, and

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[24] (Continued) order to prevent them from testifying against defendant for the kidnapping charge."

I.R. 251; IV R. 198. See Okla. Stat. Ann. tit. 21, § 701.12(2), (3), (4), (5).

his participation in the homicidal act was relatively minor." IV R. 189. On this point the district attorney argued to the jury at the sentencing phase: "Has there been any shred of evidence in this case about anyone who committed this crime except Larry Chaney. That [mitigating circumstance] has not application here." VI R. 1285 (emphasis added). The argument of the prosecutor might well have been undermined, and the jurors' reactions to this mitigating circumstance might well have been different, if the withheld evidence had been before them. That evidence and the inferences from it therefore "might have affected" the jurors, or one of them, in deciding on the death penalty.

B.

With respect to both the aggravating and mitigating circumstances issues, the

most critical piece of withheld evidence is the FBI report containing Ms. Weaver's statement. The report says that Ms. Weaver stated that she observed Mrs. Ashmore with an unidentified man and woman in the Ashmores' pickup truck in Jenks, a small community two or three miles south of Tulsa, at 4:10 p.m. on March 17. The State's case at trial, however, placed Chaney near Sallisaw, Oklahoma, over 100 miles away, at that time. Two of the State's witnesses placed Chaney on the tract of land he leased outside of Sallisaw at 4:30 p.m., near where ther bodies were later found. Other evidence of the State indicated that Chaney made a telephone call from a convenience store near Sallisaw at 4:39 p.m. In addition, the State placed the time of death as the afternoon of March 17.

Thus, this FBI report lends support to Chaney's argument in the penalty phase of his trial that others were involved in the crime and that he was not present when the murders occurred. The evidence supports the inference that another person was involved because of the presence of the unidentified man with Mrs. Ashmore, while Chaney was placed over 100 miles away. Because the murders were said to have occurred that afternoon, Mrs. Ashmore's location in Jenks late that afternoon would place her over 100 miles away from Chaney at the time the State said that her murder occurred.

Both the state trial court and the federal district court emphasized two points with respect to the FBI report containing Ms. Weaver's statement. First, they pointed to the testimony

of district attorney Fallis at the state court hearing on Chaney's application for post-conviction relief that Ms. Weaver changed part of her statement prior to Chaney's trial, and was said to have stated that she could not now identify Mrs. Ashmore as one of the two women in the truck.[25] At the outset,

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[25] We are troubled by the apparent inconsistency in the record on whether Ms. Weaver made this statement about the FBI report before Chaney's trial. Mr. Fallis testified at the state court hearing that "it is my recollection, she could not identify this person as being Mrs. Ashmore." IX R. 25. Fallis was asked on cross examination at the hearing about contacts with the witnesses: "These three different people [Weaver, Hamilton and West] were checked out back during the course of the [pretrial] investigation and also later after [defendant's attorney] filed his post-conviction appeal; is that correct," Fallis repolied "[t]hat is correct, sir." Id. at 33.

Other evidence in the record, however, indicates that Ms. Weaver may not have said she could not "now" say Mrs. Ashmore was in the truck until after the

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25 (Continued) September 1977 trial when she was contacted by the prosecutor's staff in connection with the May 1981 post-conviction proceedings:

> [Chaney's attorney:] Mr. Fallis, were you aware of any statements whether made orally to investigative [agents] or possibly reduced to writing which could be construed as a recantation or a denial of any of the information contained in [the FBI reports containing the Weaver and Hamilton statements] prior to September 1977?
>
> [Fallis:] No, -- you mean by the author?
>
> [Chaney's attorney:] By the witness.
>
> [Fallis:] No, I'm not aware of that.

IX R. 18-19 (emphasis added). Later, after stating that "it is my recollection, [Ms. Weaver] could not with certainty identify this person as being Mrs. Ashmore," id. at 25, Fallis stated that "[a]s a precaution, based upon having received your notification in the [post-conviction proceeding], she was talked to again by an investigator from my office. Her response was 'I couldn't identify the woman now, I can't identify her now.'" Id. (emphasis added). Later, Fallis stated that "[s]he recanted after [Chaney] filed for post-

we note that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87 (emphasis added). In any event, such a subsequent change on this point by Ms. Weaver does not eliminate the evidentiary value of the FBI report itself, which would have been admissible at the

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25 (Continued) conviction relief . . . . I think that is exactly why it was not considered to be valuable information to us or anybody -- she couldn't identify them. That certainly was not recanting." Id. at 34.

Thus it is not clear whether Ms. Weaver stated by the time of trial in September 1977, or not until sometime before the May 1981 postconviction proceeding, that she was not then able to say that Mrs. Ashmore was in the truck on the afternoon of March 17.

penalty phase of the case. At that critical penalty phase we are convinced that the reports themselves would have been admissible under constitutional requirements. Counsel for the State said at argument before us that he would not want to contend that the FBI report containing the Weaver statement could not be introduced; he preferred "for us to assume, since this is a death penalty case, that it could have been introduced into evidence." Transcript of Oral Argument at 21-22. We agree.

We feel that Green v. Georgia, 442 U.S. 95 (1979) (per curiam), applies with special force here. In Green, during the penalty phase the defendant was denied the opportunity to introduce the testimony of a third party repeating a statement of Green's confederate in the abduction, rape and murder episode. The

excluded statement of the confederate confided that he had shot the victim after ordering Green to run an errand. The exclusion of the proof during the penalty phase was held to be constitutional error. The Supreme Court stated:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) (plurality opinion); id. at 613-616 (opinion of Blackmun, J.), and substantial reasons existed to assume its reliability.

Id. at 97. See also Chambers v. Mississippi, 410 U.S. 284, 300-03 (1973); Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 365-66 (1981) (dis-

cussing Green). We thus conclude that the admissibility of the report here is in accord with the Supreme Court's guidance.

Ms. Weaver's statements in the FBI reports similarly were relevant to a critical issue in the punishment phase -- whether Chaney acted alone and himself killed the victims, or whether others were involved who committed the murders, and whether Chaney was present at that time. Furthermore, there are indicia of reliability here. Ms. Weaver made her statement within five days of the kidnappings to a responsible investigative agency and they were promptly recorded (the FBI report cover sheet is dated April 5, 1977). Other evidence corroborates Ms. Weaver's statement that she saw Mrs. Ashmore in Jenks at approximately 4:10 p.m. on March 17 in the

parking lot. Her statement was that two fire trucks and two police cars with sirens went by while she was in the parking lot; it was stipulated at the post-conviction hearing that the Jenks fire department answered a call at 4:08 p.m. on March 17 and that the likely route of the fire trucks would have taken them by this grocery store.

Moreover, if Chaney's counsel had had knowledge of Ms. Weaver, and had called her as a witness at the sentencing phase in September 1977, and she had then been unable to testify that Mrs. Ashmore was one of the women in the Ashmore's truck in Jenks at 4:10 p.m. on March 17, Chaney's counsel could then have introduced the FBI report in evi-

dence under the recorded recollection exception to the hearsay rule.[26]

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[26] For example, in United States v. Booz, 451 F.2d 719 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973), the Third Circuit approved the admission of an FBI report in similar circumstances. At trial, an FBI agent testified that a witness had given him a license number. After referring to a written FBI report, the agent testified as to the particular license number given him by the witness. The Third Circuit held that

> Where as here, a record is the joint product of two individuals, one who makes an oral statement and one who embodies it in a writing, if both parties are available to testify at trial as to the accuracy with which each performed his role, the recollection may be admitted. . . . If [the FBI agent] can verify the accuracy of his transcription and if [the witness] can testify he related an accurate recollection of the number to [the agent], we believe that, even though [the witness] may not have read the report, sufficient indicia of its accuracy exist to let the evidence go to the jury.

Id. at 725. Here, similar indicia of the FBI report's accuracy support its admission into evidence.

26 (Continued)

As Wigmore states, "[i]t cannot be doubted that the use of a recorded past recollection . . . now occupies a firm and unassailable place in our practice and doctrine." 3 J. Wigmore, Evidence in Trials at Common Law § 736, at 84 (Rev'd J. Chadbourn 1970). For a discussion of the common law recorded recollection exception in Oklahoma, see Lay v. State, 461 P.2d 1021, 1023 (Okla. Cr. 1969); Rasbury v. State, 303 P.2d 465, 469-70 (Okla. Cr. 1956); Note, Evidence: Present Recollection Revived and Past Recollection Recorded, 12 Okla. L. Rev. 165 (1959). See generally 3 J. Wigmore, supra, §§ 734-755; McCormick's Handbook of the Law of Evidence §§ 299-303 (E. Cleary 2d ed. 1972). Section 2803(5) of the Oklahoma evidence code, which went into effect after Chaney's trial, codifies the recorded recollection exception. Okla. Stat. Ann. tit. 12, § 2803(5) (West 1980).

Our conclusion that Ms. Weaver's statement in the FBI report, in the circumstances outlined above, could be read into evidence under the recorded recollection exception is not undercut by rules making statements nonadmissible under the public records exception. Under the analogous federal rules of evidence, federal courts have held that a statement's nonadmissibility under the public records exception does not foreclose its admissibility under the recorded recollection exception if the

In addition, we note that the change of recollection by Ms. Weaver did not affect other significant points. The district attorney indicated that Ms. Weaver could not later identify Mrs. Ashmore as having been in the truck; there is no evidence in the record that prior to Chaney's trial Ms. Weaver indicated that she could not identify the Ashmore truck or could not recall that a man and two women were in the truck at the critical 4:10 p.m. time in Jenks the day of the kidnapping when the State's evidence placed Chaney some 100 miles away near Sallisaw.[27] And, as noted, there was a

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[26] (Continued) agent who took the statement testifies. See, e.g., United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979), cert. denied, 445 U.S. 943 (1980).

[27] In the federal habeas hearing, Chaney's attorney stated that Ms. Weaver "indicated to me when I spoke with

stipulation about the time of the fire-trucks passing by the store which agreed with the time she had given, almost to the minute, and therefore corroborated her statement to the FBI. Thus, even with an indication that a portion of her statement could not be supported by later testimony, the significance of

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[27] (Continued) her [before the state court post-conviction hearing] that she in fact did not make those statements, was not sure, and was not sure at this time, which was April of '81, nor was she sure in March of 1977 when Agent McLain talked with her." XI R. 9. This statement, based on an interview with Ms. Weaver four years after the trial, is the only indication in the record that Ms. Weaver could not identify the Ashmore truck or could not recall that a man and two women were in the truck at 4:10 p.m. in Jenks. In its order overruling Chaney's application for an evidentiary hearing, the district court stated only that both the district attorney and Chaney's counsel had indicated that Ms. Weaver had stated that she could not testify that the woman she saw on March 17 was Mrs. Ashmore. I R. 129 & n.7.

the FBI report on Ms. Weaver's statement remains.

Second, the state trial judge and the federal district judge emphasized that Chaney did not call Ms. Weaver at the state court post-conviction hearing. The State likewise argues that the withheld reports are not significant because Chaney's counsel had spoken to the witnesses before the state and federal post-conviction hearings and declined to call them. Brief of Appellee at 13, 15. Once Chaney's counsel had learned the identity of the FBI agents who had taken the witness statements, he sought to reopen the state court post-conviction proceedings and subpoena the agent who had taken Ms. Weaver's statement. X R. 3. The court refused to reopen the post-conviction proceedings. Moreover, this emphasis on the failure of Chaney's

counsel to call these witnesses at the post-conviction proceeding does not come to grips with the importance of the reports themselves -- reports containing material statements which would have been admissible at the penalty phase of the trial, even without testimony by the witnesses who were interviewed by the FBI.

We are convinced that the FBI reports containing the Hamilton, West and Ashmore statements also are of significant evidentiary value themselves. Like the FBI report containing Ms. Weaver's statement, important indicia of reliability under Green support these reports; the statements were made to the FBI within two weeks after the kidnappings and were promptly recorded. According to the report containing Hamilton's statement, he said that he ob-

served the Ashmore pick-up trick arrive at 91st Street and Memorial Avenue between 8:00 a.m. and 8:30 a.m. on March 18. He observed the driver depart from the truck and enter a waiting black car which drove away. At the state court hearing on Chaney's application for post-conviction relief, district attorney Fallis said that the Hamilton statement was not exculpatory because the truck had been discovered thirty minutes to an hour earlier, and that the man Hamilton saw was an employee of Mr. Ashmore. We note, however, that the evidence at trial indicated that an FBI agent discovered the truck at 9:00 a.m. on March 18. Moreover, in its order denying Chaney's post-conviction application, the state district court noted that "[a]t 9 a.m. on March 18, an FBI agent discovered the Ashmore truck as [sic]

91st Street and Memorial [Avenue] in Tulsa." I R. 238. In addition, evidence that the pick-up truck's driver left in a waiting black car is indicative of another possible participant in the criminal venture. These circumstances undermine the prosecuting attorney's explanation for not producing the Hamilton statement.

The West statement to the FBI was that on March 17 he saw a "shiny red" pickup truck parked at 91st Street and Memorial Avenue at 4:00 p.m. to 4:30 p.m. while riding a bus home from school, and again at 5:30 p.m. while on his way to soccer practice. West did not say that he observed a blue and white pickup truck such as the one owned by the Ashmores. Chaney's counsel argues that the West statement contradicts the state's position at trial that

the Ashmore truck had been abandoned before 5:00 p.m. to 6:00 p.m. on March 17 at 91st Street and Memorial Avenue. Petitioner's Opening Brief at 7-8. Viewing the West statement in conjunction with the State's position at trial, we cannot agree with the State's argument that the Wwst statement "has totally no relationship to the case." IX R. 25.

The FBI report containing the Ashmore statement further strengthens the conclusion that the withheld evidence as a whole might have affected the death sentence determination by the jury. Although we agree that Mr. Ashmore's statement to the FBI that the caller's remark in the first telephone conversation ("There are four of us. We're not kidding. If your wife tries anything like that Honky who works for you, we'll

do her the same way.") is similar to statements made by the caller in the other two taped extortion calls played to the jury,[28] the statements in all of the FBI reports must be viewed together for their cumulative effect. As the Third Circuit has explained, "[c]ertainly, the effect of each nondisclosure

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[28] In the second telephone conversation between Mr. Ashmore and the extortionist, the caller in giving directions to Mr. Ashmore on where to place the $500,000 ransom money, stated, "My man's going to pull in there and pick it up, and if anything comes down I'm going to know about it and your old lady's going to know about it. And I'm going to tell you what, one hour after we pick up that money we're going to check everything and make sure it's all right. . . . One hour after we pick that money up . . . ." VI R. 361-62; I R. 239-40 (emphasis added). In the third telephone conversation, after Mr. Ashmore delivered the ransom money to the rodeo ground, the caller stated, "We passed your truck . . . ." VI R. 373; I R. 242 (emphasis added).

not only must be considered alone, for the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial [or a resentencing proceeding]." United States ex rel Marzeno v.Gengler, 574 F.2d 730, 736-37 (3rd Cir. 1978). See also 3 C. Wright, Federal Practice and Procedure § 557.2 at 359 (2d ed. 1982) ("It is not uncommon that defendant claims that several different pieces of evidence should have been disclosed. In weighing their materiality, presumably the cumulative effect of the nondisclosed evidence must be considered."). Viewed in this light, we conclude that the FBI reports concerning the West and Ashmore statements, together with the reports on the Weaver and Hamilton statements, might have af-

fected the jury's imposition of the death penalty.

The significance of the withheld evidence is underscored by Enmund v. Florida, 458 U.S. 782 (1982). In the conclusion of its opinion, the Supreme Court held the imposition of the death penalty unconstitutional "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Id. at 801. In this context, the significance of the withheld evidence here is that it tends to undermine the aggravating circumstances found to support the imposition of the death penalty, all four of which were based on the finding that Chaney per-

sonally killed the victims.[29] See Hatch v. State, 662 P.2d 1377, 1382-83 (Okla.Cr. 1983) (Court vacated death sentence imposed after a trial to the

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[29] Chaney also argues that "the penalty stage instructions did not adequately deal with the difference between vicarious liability under the Oklahoma felony murder statute and the personal responsibility required to constitutionally impose the death penaly under Enmund." Petitioner's Opening Brief at 27. We need not reach this argument because we are holding the death penalty determination invalid on other grounds.

In any further sentencing proceedings, careful jury instructions must explain the essential elements required by Enmund before a death sentence can be imposed. As the Court explained in Enumund, "[f]or purposes of imposing the death penalty, [the defendant's] criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." Before a death penalty can be imposed it must be proven beyond a reasonable doubt that Chane killed or attempted to kill the victim, or himself intended or contemplated that the victim's life would be taken. 458 U.S. at 801.

court and remanded because "in light of Enmund, we deem it necessary for the sentencer to give greater attention to the evidence concerning the [defendant's] individual participation and intent in the events which culminated in the murder/shootings."). Indeed, the views of the four dissenters in Enmund would demand consideration of circumstances such as are indicated by the withheld FBI reports: "Repeatedly, this Court has emphasized that capital sentencing decisions must focus 'on the circumstances of each individual homicide and individual defendant.'" 458 U.S. at 827 (O'Connor, J., dissenting) (quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976).

We are convinced that the withheld evidence, considered as a whole in conjunction with the trial record, "might

have affected" the jury's decision on the death penalty under the Agurs test. We again note that in his final rebuttal argument for the death penalty, the prosecuting attorney relied heavily on his rhetorical question whether there was any "shred of evidence" pointing to another participant (emphasis added), and argued that the jury should reject mitigation based on the ground that there was an accomplice. The withheld FBI reports might well have made the jurors, or one of them, doubt this position of the prosecutor. The withheld reports contained important mitigating evidence supporting the inference that another person or persons were involved in the kidnappings and murders, and that Chaney may not have personally killed the victims or have been present when they were killed. Moreover, the with-

held evidence tends to undermine the aggravating circumstances found by the jury to support the imposition of the death penalty, which were all premised on the finding that Chaney himself killed the victims. Therefore, we conclude that there was constitutional error in refusing to disclose the reports after the specific pretrial request for such evidence.

V

The question remains as to the proper disposition of the case in view of the conclusions we have reached.

In this connection Chaney's counsel made an alternative request that this court order that an evidentiary hearing be held by the federal district court if we refuse to order a new trial or a resentencing proceeding. See Petitioner's Opening Brief at 36-41; Petitioner's

Reply Brief at 13-14. Since we have concluded that the previously imposed death sentence cannot constitutionally stand, a new sentence will be imposed and the terms of Chaney's request will not require a federal evidentiary hearing.[30]

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[30] Chaney based his request for an evidentiary hearing in the federal district court on 28 U.S.C. § 2254 (d)(2), (3) & (6). I R. 128 n.2. In denying Chaney's request for a hearing, the court stated that the fact finding procedures employed by the state court were adequate to afford a full and fair hearing to petitioner [§ 2254(d)(2)]; the material facts were adequately declared at the state court hearing [§ 2254(d)(3)]; and the petitioner did receive a full, fair and adequate hearing in the state court proceeding [§ 2254(d)(6)]. Because petitioner has failed to prove the existence of one or more enumerated exceptions to 28 U.S.C. § 2254(d), the Court is not required to provide an evidentiary hearing.

I R. 133-34. The court also declined to exercise its discretionary power to conduct a hearing under Townsend v. Sain, 372 U.S. 293, 318 (1963) because

We are convinced for further reasons that our disposition need not require a federal evidentiary hearing. As explained earlier, we are convinced that the FBI reports themselves were and are independently admissible in light of the indicia of their reliability and the principles of Green v. Georgia. The FBI reports on the Weaver, Hamilton and West statements and their cover pages were offered and admitted in evidence at

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[30] (Continued)

> petitioner had had every reasonable opportunity to present to the state courts his claim that Brady material was withheld from him and the state court after due and proper hearing has concluded to the contrary. At this point, the Court cannot conclude the record would be augmented in any material way by petitioner's requested evidentiary hearing. The Court thus declines to exercise its discretion in this regard.

I R. 134 (footnote omitted).

the May 1, 1981 state court post-conviction hearing, and the State announced it had "[n]o objections" to the reports. IX R. 37. The FBI report on Mr. Ashmore's statement was not released until 1982, after the state court proceedings were completed, but this report was made part of this habeas record as an exhibit to the petition. The State's response did not object to the authenticity of this report, although the State argued that it was not material. Neither Chaney nor the State sought to have Weaver, Hamilton or West testify in the federal proceedings on the subject matter of their statements, and the State opposed an evidentiary hearing.[31]

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[31] Chaney's counsel stated that he wanted to call Mr. Ashmore, the state prosecutor, the FBI agent who took Weaver's statement, and the agent who took Mr. Ashmore's statement. I R. 130-31; XI R. 8-15.

Thus we have a documentary record presented of the FBI reports which were themselves admissible. From that documentary record, considered with the state trial record, we are convinced that the withheld reports "might have affected" the jurors, or at least one of them, in their determination on the death penalty. We do not know what the witnesses might have said at the trial in September 1977, but we do know the contents of their statements as made to the FBI within a few days after the events and promptly recorded. Even with changes in their recollection that testimony by these witnesses could make, we must hold that the withheld evidence might have affected the jurors' determinations on the death penalty. This being our conclusion in light of the undisputed documentary record, we are

not persuaded that a further federal evidentiary hearing is required.

On the record before us, under controlling federal constitutional decisions we must hold that as in Brady, 373 U.S. at 89-91, although petitioner's first degree murder conviction is not invalid, the death penalty imposed following such error must be adjudged constitutionally infirm. Accordingly, the order of the District Court for the Northern District of Oklahoma is affirmed with respect to the denial of the writ; the order is reversed with respect to its denial of all further relief. The case is remanded to the District Court with directions to enter judgment that the writ of habeas corpus is denied but that, determining the case as law

and justice require,[32] the death sentence of petitioner heretofore imposed is adjudged invalid under the Eighth and Fourteenth Amendments to the United States Constitution,[33] and the execution of the petitioner under this invalid death sentence is enjoined;[34] that the

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32 The federal habeas statute empowers the federal courts to make disposition of the matter "as law and justice require." 28 U.S.C. § 2243; Carafas v. LaVallee, 391 U.S. 234, 239 (1968); Sanders/Miller v. Logan, 710 F.2d 645, 656 (10th Cir. 1983).

33 We are mindful that the Brady rationale rests on the Due Process Clause of the Fourteenth Amendment. We allude also to the Eighth Amendment because the substantive materiality of the withheld evidence in question arises from Eighth Amendment demands that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S.

judgment is without prejudice to further proceedings by the State for re-determination of the sentence on the conviction, at which proceedings the petitioner is afforded an opportunity to present all evidence relevant to mitigating circumstances or to the aggravating circumstances alleged, including the withheld evidence discussed herein,

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33 (Continued) 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original)).

34 Our stay of petitioner's execution entered on July 15, 1983, 712 F.2d 441, is continued through the entry of the judgment on remand, which will enjoin the execution of petitioner under the invalid death sentence.

along with any other evidence relevant to the sentencing proceedings.[35]

In closing, the court wishes to acknowledge that we have been substantially assisted by the conscientious and able briefing and arguments by all counsel for the petitioner and the State.

IT IS SO ORDERED.

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[35] The Oklahoma courts will determine, if the prosecuting authorities seek a new evidentiary hearing on the penalty, whether in these circumstances there can be a sentencing phase hearing alone to resentence Chaney, or whether the State must retry him in order to seek the death penalty. See Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) ("The [sentencing] proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without a presentence investigation.") (emphasis added). We also note that under Oklahoma law, a life sentence may be imposed for a conviction for murder in the first degree if a death sentence is ruled unconstitutional. See id. tit. 21, § 701.9(A) ("A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."); id. tit. 21,

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35 (Continued) § 701.15 ("In the event the death penalty is held to be unconstitutional by the Oklahoma Court of Criminal Appeals or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court, and the court shall sentence such person to imprisonment for life.").

The Oklahoma Court of Criminal Appeals has modified death sentences imposed as mandatory punishment under Oklahoma statutes to sentences of life imprisonment following Supreme Court decisions holding such mandatory death penalties unconstitutional. E.g., Roberts v. State, 564 P.2d 246 (Okla. Cr. 1977); Brown v. State, 563 P.2d 1182 (Okla. Cr. 1977); Miller v. State, 560 P.2d 579 (Okla. Cr. 1977).

APPENDIX B

LARRY LEON CHANEY, Petitioner- Appellant, v. JOHN N. BROWN, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma, Respondent- Appellee.	)	JUDGMENT No. 83-1862 (D.C. # 83-0519)

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed with respect to the denial of the writ. The judgment of that court is reversed with respect to its denial of all further relief. The cause is

remanded to the United States District Court for the Northern District of Oklahoma with directions to enter judgment that the writ of habeas corpus is denied but that, determining the case as law and justice require, the death sentence of petitioner heretofore imposed is adjudged invalid under the Eighth and Fourteenth Amendments to the United States Constitution, and the execution of the petitioner under this invalid death sentence is enjoined; and that the judgment is without prejudice to further proceedings by the State for re-determination of the sentence on the conviction, at which proceedings the petitioner is afforded an opportunity to present all evidence relevant to mitigating circumstances or to the aggravating circumstances alleged, including the withheld evidence discussed herein, along with

any other evidence relevant to the sentencing proceedings.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

LARRY LEON CHANEY, Petitioner- Appellant, v. JOHN N. BROWN, Warden, Oklahoma State Penitentary, McAlester, Oklahoma, Respondent- Appellee.	)	No. 83-1862

O R D E R

The petition for rehearing with a suggestion for rehearing in banc makes two principal arguments. We are not convinced by either contention.

First, the State says that the motion of petitioner Chaney to produce Brady evidence was only a general request and that we applied the incorrect Agurs test. The argument overlooks significant points. Petitioner's coun-

sel did not have the names of persons whose statements had been taken and therefore requested, inter alia, favorable or exculpatory statements of all persons interviewed by state investigators, city police or any other governmental agency and transcriptions of any oral statements made to such agencies. I R. 59-60. More importantly, in response to petitioner's motion, the state district court specified that the State produce, among other things, any and all evidence in the custody of the District Attorney's office, the Federal Bureau of Investigation, and other named agencies which may be favorable to the petitioner or is exculpatory. IV R. 78-79. The specificity of the request must, of course, be judged on the facts of each case and the circumstances here strongly support petitioner's position

that the request was as specific as it could be. Indeed, at argument before us counsel for the State conceded that in this case "it may not be possible to be more specific," stating merely that it may be that such requests should always be considered general. (Tr. Oral Argument 27-28). See United States v. Warhop, No. 83-1569, slip op. 7, ___ F.2d ___, ___ (10th Cir. 1984). We remain convinced that our holding is correct, particularly in light of the general rule that "[e]vidence must be reviewed under the Agurs specific request standard when there is uncertainty about the request." King v. Ponte, 717 F.2d 635, 640 (1st Cir. 1983) (citing United States ex rel Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978)). In death penalty cases the rule should apply with special force when the demands of due

process for fairness in all phases of the trial are the strongest.

Second, the State claims that the invalidation of the death penalty without a hearing was unfair to the State. However, the State opposed an evidentiary hearing in the federal district court, stating that there was a sufficient factual basis presented from the state trial and the state post-conviction proceedings. (See XI R. 21, Transcript of June 17, 1983, federal habeas hearing). The petitioner relied primarily on the documentary record from the state court post-conviction proceeding where the F.B.I. statements were introduced without objection by the State,[1] as discussed in our opinion.

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[1] We hereby order that the last sentence on page 57 of the opinion, and the accompanying footnote 31, be corrected to read as follows:

The essentials of the record are the withheld statements which we have held admissible. Moreover, at argument before us counsel for the State said he did not want to contend that the Weaver statement to the FBI could not be introduced and that he preferred "for us to assume, since this is a death

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[1] (Continued)

Neither Chaney nor the State sought to have Weaver, Hamilton or West testify in the federal proceedings on the subject matter of their statements, and the State opposed an evidentiary hearing.[31]

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[31] Chaney's counsel stated that he wanted to call Mr. Ashmore, the state prosecutor, the FBI agent who took Weaver's statement, and the agent who took Mr. Ashmore's statement. I R. 130-31; XI R. 8-15.

A substitute page 57 to effect the above corrections is being filed this day.

penalty case, that it could have been introduced into evidence." (Tr. Oral Argument 21-22). Since we remain convinced that such admissible evidence in the form of te withheld statements, by its own impact, might have affected the choice of the penalty, the death sentence must be held invalid.

A further complaint is made that the State must have a complete new trial if it is to reimpose the death penalty instead of a life sentence. We considered this circumstance in our opinion at n.35. The State's difficulty arises because the state prosecutor withheld the evidence. Such circumstances in no way justify disregarding fundamental constitutional violations which flawed the fairness of the trial.

Accordingly, the petition for rehearing is denied by the panel. No mem-

ber of the panel and no judge in regular active service on the court having requested a poll, the suggestion for rehearing in banc is also denied. Rule 35, F.R.A.P.

HOWARD K. PHILLIPS, CLERK

APPENDIX D

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	CRF 77-704
v.	)	Case No. CRF 77-705
	)	
LARRY LEE [sic] CHANEY,	)	
	)	
Defendant.	)	

MOTION TO PRODUCE

Defendant moves that the State be required to disclose and, if a tangible item is involved, to produce for inspection and/or copying by the Defendant all material in the possession and control of the State in the future, which material may be favorable or exculpatory to the Defendant, which could reasonably affect the determination of the Defendant's guilt or innocence, re-

duce punishment, is relevant to the subject matter of the charge, or which may in any manner assist the Defendant. Disclosure and production of the material herein requested is to be made without regard to whether the material to be disclosed and produced is considered by the State to be admissible at the trial, and whether or not the State feels the material is exculpatory in nature.

Defendant requests that disclosure and production of said material include, but not be limited to, the following:

1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case,

whether or not the State intends to call them to testify at trial, and whether or not,

(a) The statement, if in writing, has been signed or approved by the witness.

(b) the statement relates to the proposed subject matter of the witness to be called at trial.

(c) the statement is merely a summary of the facts related to the interviewer.

2. Stenographic recordings or transcriptions of any oral statement made by <u>any</u> person to an agent of the State, an investigator or police officer at the Tulsa Police Department, a member of the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the

subject matter of the case whether or not,

(a) the stenographic recordings or transcriptions are a substantially verbatim recital of the statement, or

(b) the statement was recorded contemporaneously with its making, or

(c) the statement relates to the proposed subject matter of the testimony of the witness to be used at trial.

3. The transcript of any statement given to the District Attorney's Office during their investigation concerning the subject matter herein by any persons, whether or not the State intends to call them at the time of the trial, and whether or not the statements were recorded.

(a) in addition, transcripts of all polygraph proceedings given to the above named Defendant or any witness

or perspective witness, to include all questions asked and all answers elicited by the above mentioned persons.

(b) in addition, a copy of the polygraph chart results from which the polygraph examiner formed his opinion.

4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

5. The prior criminal record of all persons the State intends to call at time of trial, including indictments, convictions, acquittals, or pending charges. This information is required by the defense to determine whether bias or prejudice exist on the part of the State witnesses and to impeach the credibility of said witnesses if any of them have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Any material relating to the competency of witnesses to be called by the State, such as a history of mental illness or psychiatric care or civil or criminal commitment to a State or private mental hosptial.

7. Written or recorded statements or a summary of any such statements made by the Defendant in this case or copies of any statements, admissions, confessions, or declarations against interest verbatim or otherwise which may have been made by the Defendant and the names of the persons taking such statements.

8. The original report of the arresting officer(s) in this case.

9. Any and all other evidence o [sic] in the custody of the District Attorney's Office, the Tulsa Police Department, the Tulsa County Sheriff's Office, or any other agency of the State

which may be favorable to the Defendant or exculpatory.

10. All reports of a scientific nature, and the subject matter of these reports, which have been prepared by an expert, technologist, identification officer, or other scientific authority pertaining to any instrument, substance or means allegedly used in the commission of the crime and any report made or which may be made which relates to any fingerprints, ballistics reports, handwriting exemplars, photographs of the crime scene together with the prints, exemplar, photographs or any other scientific material relating to this case which may be exculpatory in nature, or favorable to the Defendant.

11. Any physical or tangible objects in the possession of the District Attorney's Office, the Tulsa Police De-

partment, the Tulsa County Sheriff's Office, the Oklahoma State Bureau of Investigation, or the Federal Bureau of Investigation, or any other governmental agency including, but not limited to, items taken from the Defendant's person or his property, together with any written reports whether of a scientific nature or not, that the State intends to use to connect or identify this Defendant with this alleged crime.

12. Disclosure of the identity of any informant used by the Tulsa Police Department or expected to be used in the procurement of or use of evidence expected to be used against the Defendant.

13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement official.

14. Any inconsistencies between the testimony of State's witnesses at the preliminary hearing or trial of the case and statements or reports of statements included within the District Attorney's case file.

15. The exact date and time of the alleged kidnapping and alleged murder if known. If not known, any and all information in possession of the State of Oklahoma or any governmental body that would shed light upon the date and time of the alleged crimes in question.

The Defendant therefore respectfully requests the Honorable Court to require the State of Oklahoma to produce all material now known or which may become known, or which through the exercise of due diligence may be learned from the investigating officers or witnesses in the case, which is exculpatory

in nature or favorable to the accused, or which may lead to exculpatory material or which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

Defendant further moves this Court to conduct an in camera inspection of the District Attorney's file and order that a neutral and a detached judicial officer may determine the existence or nonexistence of such material.

Allen M. Smallwood
Attorney for Defendant
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918-585-9837

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing Motion to Produce was delivered to the District Attorney in and for Tulsa County, Oklahoma, on the _____ day of _____, 1977.

Allen M. Smallwood
Attorney for Defendant

ORIGINAL

No. 84-169

Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,

Petitioner,

v.

LARRY LEON CHANEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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OTHER AUTHORITIES CITED:

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No. 84-169

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,

Petitioner,

v.

LARRY LEON CHANEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 730 F.2d 1334 (10th Cir. 1984). (Pet. Appendix A-2)

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, invalidating the death penalty and remanding, was entered on March 21, 1984. A petition for rehearing was denied on May 30, 1984. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides in part:

nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the State may constitutionally suppress F.B.I. witness statements which demonstrate the participation of persons other than the defendant in a capital case in the face of an explicit court order to produce such exculpatory evidence, where the State argues to the jury in support of the death penalty that there is no shred of evidence that anyone other than the defendant was involved in the crime.

STATEMENT OF THE CASE

The Suppressed Evidence Directly Contradicted the State's Theory of the Case

The case against Chaney was entirely circumstantial and premised upon his acting alone. Simply stated, the State's theory of the case was that Chaney, on the late morning of March 17, 1977, kidnapped two women in Jenks, Oklahoma, drove them some 100 miles to Sallisaw, Oklahoma, strangled them sometime that afternoon and buried them on his property near Sallisaw. See Map, Res. Appendix C1. The place of death was undetermined. Transportation to Sallisaw and back to Jenks was in a vehicle other than the victim's truck.

Petitioner, understandably perhaps, totally fails to disclose its theory of the case, as tried below, and thereby glosses over the obviously material and substantial character of the suppressed evidence. Also missing from the Petition is any acknowledgment that the State's theory that Chaney acted alone was its justification to the jury for imposition of the death penalty.

We first treat here the point - counterpoint between the evidence presented to the jury and the suppressed evidence, which consisted of four statements made to the F.B.I. by Mrs. Poppy Weaver, Kyle West, J.C. Hamilton, and Philip Ashmore, husband of one of the victims.

Evidence introduced at trial indicated the victims Kendal Inez Ashmore and Kathy Ann Brown were last seen alive at approximately 9:30 a.m. March 17, 1977, by Phillip Ashmore at his business in Tulsa, Oklahoma. The two women had come to borrow Ashmore's blue and white pickup truck. Neither was seen alive again except by Poppy Weaver, a witness who had known Mrs. Ashmore for years. In her statement to the F.B.I. Mrs. Weaver said that she saw Mrs. Ashmore with an unidentified man and woman in the Ashmore pickup truck in a neighborhood grocery store parking lot at 4:10 the afternoon of March 17, a time when according to the State's theory of the case, Mrs. Ashmore was already dead and buried, and Chaney was 100 miles away near the burial site.

Thus, at trial the prosecution established through two witnesses that Chaney was observed walking on his leased property near Sallisaw, Oklahoma at 4:30 p.m. on March 17. A third witness testified that he saw Chaney with dirt on his pants using the telephone in the witness' store near Sallisaw between 3:00 p.m. and 5:00 p.m. on the same afternoon. The time of this call was stipulated to be 4:39 p.m.

The State's testimony placed the time of death as the afternoon of March 17. Chaney v. Brown, 730 F.2d 1334, 1337 (10th Cir. 1984); Pet. Appendix 7. In the State's closing argument, the prosecution argued that Chaney buried the victims before going to use the telephone at 4:39 p.m. Weaver's statement not only showed Mrs. Ashmore alive at 4:10 p.m. on March 17, but it clearly requires the conclusion that Chaney was not acting alone.

Similarly, three of the four suppressed F.B.I. statements contradict the State's theory of the time, use, and location of Ashmore's blue and white pickup truck in the kidnapping, and support the thesis that Chaney did not act alone. The State argued that the truck was abandoned at the intersection of 91st and Memorial in the afternoon of March 17. The truck supposedly remained there until Mr. Ashmore's employee retrieved it at 9:00 a.m. on the 18th. Three suppressed statements say otherwise. Kyle West reported to the F.B.I. that on March 17 between 4:00 and 4:30 p.m. he observed a "shiny red pickup" with a "white stripe across it" and a "'clip-on' type CB antenna" at that corner. His observation of the intersection did not include any mention of a blue and white pickup. Res. Appendix B 5-6.

In another F.B.I. statement, J. C. Hamilton reported that he saw a truck arrive at the same intersection at about 8:00 a.m., March 18. The driver left the pickup, approached a waiting black car and left the area. Hamilton, interviewed on the 18th, identified the pickup as the same truck still parked at the intersection (the Ashmore truck). Res. Appendix B 3. The State submitted no evidence that connected Chaney with a black car.

Participation of others is also supported by Phillip Ashmore's suppressed statement relating that in the first,

unrecorded, extortion call, the caller specifically told him "there are four of us," "we're not kidding," and "we'll do her the same way." Res. Appendix B 10. Ashmore's suppressed statement also revealed that both Ashmore and his daughter attempted to call the telephone in the truck during the afternoon on March 17. Res. Appendix B 10. According to the statement, the phone was picked up and placed back on the receiver both times. While Mr. Ashmore testified at trial, his testimony omitted both the plural references, and the two disconnected attempts to telephone the truck. These incidents place someone in the truck between 3:00 p.m. and 5:00 p.m. on March 17 and corroborate Mrs. Weaver's observation of people in the pickup truck in the parking lot during this time period.

Much of this activity occurred while Chaney, according to the State, was 100 miles away in Sallisaw, where, again according to the State, the two women were already buried. Thus, the suppressed evidence flies in the face of the State's theory that Chaney acted alone, and is clearly exculpatory.

Chaney's Brady Request and the Trial Court's Order

The four witness statements withheld by the State were taken by the F.B.I. in March, 1977. Respondent's Motion to Produce was filed April 1, 1977, five months before trial. The Motion is reproduced in full in the Pet. Appendix D. We consider here those portions of the Motion pertinent to the issue of whether it was general or specific, in the context of the witness statements which were suppressed.

The Motion contained among its fifteen paragraphs, the following:

> 1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case, ...

2. Stenographic recordings or transcriptions of any oral statement made by any person to an agent of the State, an investigator or police officer at the Tulsa Police Department, a member of the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the subject matter of the case, ...

. . . .

4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

. . . .

13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement official.

730 F.2d at 1340; Pet. Appendix 26-29 (emphasis added in the opinion below).

This case involves more than a written request to the prosecutor from defense counsel. Although not discussed in the Petition, the trial judge entered an Order directing the State to provide certain evidence to the defendant.

The record reveals that on April 6, 1977 the District Court of Tulsa County responded to Chaney's requests by ordering the State to produce the following:

> Any and all other evidence now in the custody of the District Attorney's office, the Tulsa Police Department, the Tulsa County Sheriff's office, the Federal Bureau of Investigation, the State Crime Bureau for the State of Oklahoma, or any other agency of any State or Federal government, which may be favorable to the Defendant or is exculpatory.

730 F.2d at 1340-41; Pet. Appendix 29. (emphasis added in the opinion below).

The four suppressed statements first came to light in March, 1981 some three and half years after Chaney's trial, in response to Freedom of Information Act requests directed to the Federal Bureau of Investigation.

These disclosures led to a hearing in May, 1981 before the trial court where the prosecutor was questioned about his decision to suppress the statements. The prosecutor admitted that

he had possession of these statements by the time of the April 6 Order directing production. The effect of his testimony was not that because the Motion or Order was so general he simply overlooked the statements. Rather, he testified that in the context of the Motion and Order, he specifically reviewed these statements and determined to suppress them because in his view they were not exculpatory. In view of this conscious decision the State cannot (and the Petition does not) assert that it had no notice of what it had been ordered to produce. The prosecutor made this determination unilaterally -- he did not seek the trial court's assistance through in camera review.

The names of Weaver, West and Hamilton had never been disclosed in any context and there was no other way Chaney could have discovered them. None of the three testified at the trial. As noted by the Tenth Circuit at the oral argument before it, the State conceded that the requests were therefore as specific as they could be under the circumstances. The only thing missing from the Motion was the name of each of these witnesses. 730 F.2d at 1342; Pet. Appendix 35-36.

The Suppressed Evidence Was Material to Imposition of the Death Sentence

True to its theory of the case, the State argued at the penalty phase of the trial, that since Chaney acted alone the aggravating circumstances necessary for imposition of the death penalty were fully present. The jury agreed. Its verdict set forth the following aggravating circumstances:

> 1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 from the family of Kendal Inez Ashmore.

> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against defendant for the kidnapping charge.

730 F.2d at 1352, n.24; Pet. Appendix 85-86.

Each aggravating circumstance is premised upon Chaney's being the sole participant. Moreover, the prosecutor took full advantage of the suppressed evidence by arguing to the jury at the sentencing phase, "Has there been any shred of evidence in this case about anyone who committed this crime except Larry Chaney." 730 F.2d at 1352; Pet. Appendix 87.

The State admitted that the suppressed evidence was admissible at least at the penalty phase. 730 F.2d at 1354; Pet. Appendix 93. In view of the fact the suppressed evidence constituted the sole, independent evidence that Chaney acted in association with others, it can hardly be argued that the suppressed evidence was not relevant and material at the penalty stage.

ARGUMENT

This case is not an appropriate case for a grant of Writ of Certiorari. Simply, the case involves neither a change of law, nor a conflict among the circuits, but instead, demonstrates a careful application of established law. What this case presents is a defense request for evidence, a court order to produce, and well-settled law applied to the facts. Thus, this Court should not grant certiorari because this case merely applies faithfully the law of United States v. Agurs, 427 U.S. 97 (1976).

SUMMARY OF ARGUMENT

In opposition to the Petition we present these points:

1. With respect to Question One, under the circumstances presented the Brady request was specific and the prosecution actually was given notice of what was requested, but nevertheless suppressed the evidence because of its erroneous, unilateral determination that the statements were not exculpatory. The Court of Appeals correctly applied the Agurs general/specific criteria, and the alleged conflict among the circuits does not exist.

2. With respect to Question Two, as the State's demand for the death penalty was based entirely upon its theory that Chaney acted alone, and since the suppressed evidence was not cumulative and directly contradicted this theory, the Court of Appeals correctly applied Agurs' standard of materiality in determining that the suppressed evidence could have affected the jury's imposition of the death penalty. Since this mitigating evidence was withheld from the jury, the death penalty was correctly overturned by the Court of Appeals under Enmund v. Florida, 458 U.S. 782 (1982). There was no error, and there is no conflict among the circuits on this point.

Further, with regard to Question Two, Respondent's position is simply that the Petition presents no issue appropriate for review, as it improperly seeks this Court's revision of Oklahoma's death penalty statute to eliminate the statutory requirement of a unanimous jury verdict in support of the death penalty.

1. Chaney's Brady Request Was Specific, and In Fact Gave the Prosecution Notice of Exactly What Was Desired

The Petition distorts the issues in the case so severely that it presents a misleading view of the underpinnings of the opinion below. Buried on page twenty-eight of the petition is the State's first reference to Chaney's Brady request (Brady v. Maryland, 373 U.S. 83 (1963), in a terse, one sentence summary. Petitioner briefly paraphrases the Motion, omits mention of the trial court's Order for production of the statements and proceeds to apply its own analysis, ignoring the well reasoned and carefully documented Tenth Circuit analysis. The Petition thus fails to reveal what the case is about, and mischaracterizes the opinion below as guaranteeing defendants a constitutional right "to obtain mitigating evidence held by the prosecutor." Petition 47.

The Tenth Circuit was well-aware of the controlling legal standard for determining that a Brady request is specific, and correctly applied it. The court began the section of its opinion entitled "Characterization of Chaney's Brady request under Agurs" as follows:

> The Supreme Court discussed the distinction between general and specific Brady requests in Agurs. The Court stated that a general request "really gives the prosecutor no better notice than if no request is made." 427 U.S. at 106-07. As a result, the Court held that for purposes of applying the reasonable doubt test, "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." Id. at 107. In contrast, a specific request gives "the prosecutor notice of exactly what the defense desired." Id. (Footnote omitted).

730 F.2d at 1341; Pet. Appendix 31-32.

After discussing the Brady and Agurs guidelines and standards of materiality, the Tenth Circuit evaluated at length the

various parts of Chaney's Brady request. The court noted that the request included "transcription of any oral statement made by any person to . . . a member of any other governmental agency in connection with the subject matter of this case," as well as "all oral statements made to any . . . law enforcement official." 730 F.2d at 1341-42; Pet. Appendix 34-35 (emphasis added in the opinion below).

The Tenth Circuit continued its analysis:

> Here, all four of the withheld F.B.I. reports contain statements made to the F.B.I. by witnesses. Moreover, three of the reports contain the legend "date of transcription." The statements in the four F.B.I. reports thus clearly are covered by Chaney's Brady request. This request therefore gave the prosecutor "notice of exactly what the defense desired" under Agurs. Indeed, it is difficult to imagine how Chaney could have requested the reports with greater specificity without knowing the identity of three of the witnesses whose statements were included in the F.B.I. reports. The State conceded at oral argument before us that in such a situtation "[i]t may not be possible to be more specific" in formulating a Brady request, but contended that "it may be that this kind of request can always be considered general." Transcript of Oral Argument at 27-28. We disagree and hold that the request is specific because it gave the prosecutor "notice of exactly what the defense required" under Agurs, and because it was formulated in terms as specific as possible in the circumstances.

730 F.2d at 1342; Pet. Appendix 35-36.

No one can seriously argue that there was any way Chaney could have made a more specific request without knowing the identity of persons interviewed by the F.B.I. Chaney had no other source for learning of Weaver, Hamilton or West. They did not testify at the trial and were never mentioned by the State. We submit that in these circumstances, the Tenth Circuit correctly applied Agurs.

The State's Petition disingenuously argues that the text of the request is the only factor to be considered. This

Court's Agurs analysis however requires that all circumstances surrounding the request be considered as well as the language of the request itself. Agurs does not contemplate an a priori list of Brady - motion language, some words creating "general" requests and others labeled "specific." Instead, Agurs establishes a functional "notice" standard which courts must apply based on two considerations: (1) the particular facts surrounding the actual request and (2) the circumstances surrounding the actual evidence in question.

What the Tenth Circuit did in this case was examine Chaney's request and the actual evidence suppressed along with the factual circumstances surrounding both, and make a determination that there was sufficient notice to the prosecutor. The Respondent respectfully submits that this type of determination is exactly what is expected under Agurs and, therefore, is not appropriate for Supreme Court review.

Not only does the State stress the language of the request as the only consideration, the State fails to deal with the effect of the explicit order to produce. Here the trial judge entered an order for the State to disclose exculpatory evidence in the custody of the F.B.I. The Order meant precisely what it said and no other interpretation is possible.

The cases upon which the State seeks to demonstrate a conflict among the Circuits are irrelevant where a pretrial order has been entered and ignored and the undisclosed material involves evidence in mitigiation of the death penalty. When either of these two factors are considered no conflicting court of appeals decision exists. None of the cases relied upon as conflicting indicate that under these circumstances other courts of appeals would have reached a different result.

2. No Conflict Exists in the Courts of Appeals Which Requires Resolution by This Court.

None of the cases relied upon by Petitioner involved judicial approval of a prosecutor's suppression of witness statements, which would allow a capital defendant to show that others were involved in the crime, and thus, attempt to mitigate his sentence. The courts of appeals, contrary to the impression left by the Petitioner, do not operate in a vacuum and simply apply a litmus test to the text of Brady requests. Rather, the courts of appeals analyze Brady requests in the full context of each case. Petitioner cited numerous cases which found Brady requests to be general, but failed to show how the determination depended on the facts of the case. The Respondent will categorize the cases and then provide examples to the Court.

First, many of the cases cited involved primarily impeachment evidence. Second, in some cases the request was nonexistent or so casual that the very nature of the request distinguished the case from the carefully drafted pre-trial motion of the Chaney case. Third, in other cases the withheld evidence was actually known to the defendant or offered to defense counsel before the trial concluded. Finally, and most importantly, no case cited by Petitioner deals with the issue of suppressed statements which might have affected the jury's imposition of the death penalty.

The Petition, without disclosing the nature of the evidence withheld, cites, in support of its assertion that a conflict in the circuits exists, an array of circuit cases which involve only a prosecutor's suppression of trivial impeachment evidence e.g., Cramer v. Fahner, 683 F.2d 1376 (7th Cir. 1982); United States v. Mackey, 571 F.2d 376 (7th Cir. 1978); United States v. Cody, 722 F.2d 1052 (1st Cir. 1983); United States v.

DiCarlo, 575 F.2d 952 (1st Cir. 1978); United States v. Martorano, 663 F.2d 1113 (1st Cir. 1981); United States v. Menghi, 641 F.2d 72 (2d Cir. 1981); Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978); United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978); United States v. Lasky, 548 F.2d 835 (9th Cir. 1977). Petition 27-41.

Frequently in these cases, the reviewing courts concluded that the omitted evidence was merely additional material for impeaching an already thoroughly impeached witness, Mackey, 571 F.2d at 389, or that the jury was well aware that the witness's credibility was damaged and it would be unlikely that additional knowledge of promises or rewards would have weakened the State's case. Cody, 722 F.2d at 1062. The Martorano court found the impeachment weight of the suppressed evidence slight. "[T]he vein (questioning) would not have led to the mother lode; it would have petered out to nothing." Martorano, 663 F.2d at 1116. The DiCarlo court found no significance in the suppressed evidence.

Not only does Petitioner rely on cases which sustain the suppression of insignificant impeachment material, but many of its cited cases hold the suppressed evidence to be cumulative. Goldberg found the facts cumulative and intrinsically of questionable value, Goldberg, 582 F.2d at 490, so did Mackey, and Ostrer. Mackey, 571 F.2d at 389; Ostrer, 577 F.2d at 787.

In some of the cases cited, the request was vague or nonexistent. The Cramer opinion found no Brady request was made. Obviously, the suppressed evidence fell into the third Agurs category with the reasonable doubt standard properly applied. A statement by the prosecutor in United States v. Mangieri, 694 F.2d 1270, 1288 (D.C. Cir. 1982), that he had an understanding with the defendant that if documents turned up, he would supply them is hardly the type of request at issue in

Chaney. In Ostrer the defendant made no request but attempted to bootstrap himself with his codefendant's request.

Several of the cases cited by the State are inapplicable to the issue here because the defendant gained access to the suppressed evidence before the close of trial. For example in Menghi, the material was delivered to counsel before the defendant rested and in Mangieri, the government offered to let the defendant see the investigative file two months before trial. The reviewing court asserted that the suppressed evidence claim was merely a way to make up for a failure to make a timely objection to a government investigation. Similarly in Wagster v. Overberg, 560 F.2d 735 (6th Cir. 1977), the court determined the defendant was not prejudiced because the withheld statement was from a witness known to the defendant and the information was easily obtainable directly from the witness. Defense counsel had apparently neglected to interview the witness.

The Petitioner also relies on cases which involve requests which are obviously boilerplate and so broad that the request easily falls into the third Agurs category--requests so broad that they are no better notice of what is sought than if no request had been made. Mackey (request for "inconsistencies between statements given by any person," and general impeachment material); DiCarlo (all materials favorable to defendant or which would lead to impeachment); Mangieri (statement) by prosecutor to turn over documents if they turn up); Ostrer, (boilerplate - "all Brady material").

Other requests differ from Chaney's request because they, in effect, ask for everything e.g., United States v. Weiner, 578 F.2d 757 (9th Cir. 1978), (oral motion for all SEC transcripts, statements, interviews by F.B.I., post office, or anyone else). The court called this the shotgun approach, an equivalent to no request at all); Lasky (earlier request for

probation reports for 14 named persons quite specific but subsequent requests asked for all Brady material and then the entire file).

Petitioner relies heavily upon United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) which admittedly involved a Brady request with wording similar to Chaney's. Moore, however, differs dramatically from this case. First, the witness statement, which was not produced, was from a person whose identity was known to the defense. Second, the statement would, at best, only have given the defense minor cross examination material for use on an alibi defense. With two eyewitnesses to the barroom murder it is highly unlikely that the suppressed evidence would have mattered. Third, this Court had previously determined that the suppressed evidence was not material to the question of guilt and declined to reverse the conviction. Finally, the death sentence was not an issue in Moore because this Court had already reversed the death penalty. Moore v. Illinois, 408 U.S. 786, 798 (1972) reh. den. 409 U.S. 897.

In contrast to Moore, Chaney's conviction was based on circumstantial evidence, and the suppressed evidence of involvement of others went to the very heart of Chaney's efforts to mitigate punishment. Moore, on the other hand, was convicted by eyewitness testimony. The Moore court found the prosecution's failure to provide the items of evidence not material to the question of the defendant's guilt. Here, in making its determination that the suppressed evidence was material, the Tenth Circuit perceptively analyzed both the practical and the constitutional significance of the withheld evidence to Chaney's penalty phase. 730 F.2d at 1351-1357; Pet. Appendix 49-112. In comparison, none of the evidence withheld in Moore[1] comes close to being as significant.

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[1] The evidence is listed at Moore, 560 F.2d at 290.

The cases Petitioner asserts create a conflict on the general--specific Brady issue simply do not when they are examined. No case relied upon by Petitioner deals with the issue of suppressed evidence which is the defendant's best available evidence to offer as a mitigating factor against imposition of the death penalty.

In summary, the cases fall generally into three categories:

(1) Impeachment Evidence. Numerous cases stated that the suppressed evidence did not affect defendant's guilt or the suppressed evidence was not related to guilt, only impeachment. Thus, the undisclosed material did not go to substantive matters of guilt or punishment.

(2) In some cases the request was nonexistent or so casual that the very nature of the request distinguished the case from the carefully prepared, written pre-trial motion in this case.

(3) In other cases the undisclosed evidence was actually known to the defendant or offered to the defense counsel before the trial concluded. Thus, the defendant was not critically prejudiced.

The Tenth Circuit[2] made a well considered and appropriate

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[2] The Court, no doubt, is aware that the Tenth Circuit is experienced in applying the Agurs standard to Brady requests. (See 730 F.2d at 1340, n.7; Pet. Appendix 26, for list of Tenth circuit cases dealing with Brady requests.) The Tenth Circuit shows no bias in favor of either the prosecution or the defense in deciding these issues. A recent Tenth Circuit case, United States v. Warhop, 732 F.2d 775 (10th Cir. 1984) found no reversible error from nondisclosure of material deemed to be covered by a Brady request. Discusssing the Agurs categories, the Warhop opinion stated that "in all three situations, the burden is upon the defendant to prove: (1) the suppression of the evidence by the prosecution; (2) the favorable character of the suppressed evidence to the defense; and (3) the materiality of the suppressed evidence." Id. at 778.

In Warhop The Tenth Circuit found the request to Oklahoma authorities for any F.B.I. interview statements which tend to exculpate the defendant or impeach government witnesses to be a specific request, but held that the suppressed evidence had no material effect on the verdict and thus, no error was made.

decision. Faced with the facts confronting the court in the Chaney case, no other circuit would reach a different conclusion. Since no conflict exists among the circuits on the issues presented by this case, this Court should deny the Writ of Certiorari.

3. The Court of Appeals Correctly Applied Agurs' Standard of Materiality in Determining that the Suppressed Evidence Might Have Affected The Jury's Imposition of The Death Penalty.

Under Question Two, the State challenges the Tenth Circuit's application of the Agurs' standard of materiality of the suppressed evidence as it relates to imposition of the death penalty. It devotes only a few pages to the issue and admits that its position is grounded on its contention "that the discovery request in the present case was general in nature." Petition 45. As we have demonstrated above, Petitioner's contention is erroneous; therefore, its second question presented should also be rejected and the Writ of Certiorari be denied.

In this section Respondent will show that the Tenth Circuit correctly applied the Agurs' standard of materiality and thus, no manifest error requiring correction by this Court exists. Interestingly, Petitioner does not contend that any conflict in the Circuits exists on this issue.

The State's demand for the death penalty was based entirely upon its theory that Chaney acted alone. The Respondent asserts that the suppressed evidence contradicts this theory and is, therefore, material to his mitigation attempts at the penalty phase at trial.

The Tenth Circuit opinion thoroughly demonstrates the relevance and materiality of the suppressed evidence to the issue of mitigation. The court considered Mrs. Weaver's statement the most critical piece of suppressed evidence in the case.

730 F.2d at 1352-53; Pet. Appendix 87-88. Weaver's observation of Ashmore and an unknown man and women in the Ashmore pickup in the town of Jenks at 4:10 p.m. on March 17, placed the victim, still alive, over 100 miles from the Respondent. Since the State placed the time of death as the afternoon of March 17 and three State's witnesses placed Chaney near Sallisaw, Oklahoma, at the same time as Weaver's observation, the suppressed report supports Chaney's contention at sentencing that he was not present when the murders took place. 730 F.2d at 1353; Pet. Appendix 89.

The Tenth Circuit concluded:

> The evidence supports the inference that another person was involved because of the presence of the unidentified man with Mrs. Ashmore, while Chaney was placed over 100 miles away. Because the murders were said to have occurred that afternoon, Mrs. Ashmore's location in Jenks late that afternoon would place her over 100 miles away from Chaney at the time the State said that her murder occurred.

730 F.2d at 1353; Pet. Appendix 89.

In addition, the Tenth Circuit stressed the indicia of reliability in all the suppressed statements. Weaver's statement was made five days after the kidnapping to a responsible F.B.I. agent, and promptly recorded. Weaver, a neighbor of the Ashmores, was acquainted with Mrs. Ashmore and knew the Ashmore's pickup truck. The time of her observation was corroborated by a stipulation that the fire department's sirens sounded at the time she said they did. Similarly, the remaining reports were made under reliable circumstances; the statements were made to F.B.I. investigators within a two week period after the kidnappings and were recorded promptly. 730 F.2d at 1354-56; Pet. Appendix 95-102.

The Tenth Circuit thoroughly evaluated the evidentiary value of the remaining suppressed reports. 730 F.2d at

1355-56; Pet. Appendix 102-106. The court correctly focused on Hamilton's "evidence that the pickup truck's driver left in a waiting black car is indicative of another possible participant in the criminal venture." 730 F.2d at 1356; Pet. Appendix 104.

The court also disagreed with the State's position that West's statement "has totally no relationship to the case." 730 F.2d at 1356; Pet. Appendix 105. Since the State's theory describes the truck as abandoned before 5:00 to 6:00 p.m. at the 91st and Memorial intersection, West's observation at 4:00 to 4:30 p.m. and then again at 5:30 p.m. of a different truck in the intersection, with no mention of the Ashmore truck, does have a bearing on the case.

In discussing the fourth statement--Mr. Ashmore's--the Tenth Circuit agrees with the State that the plural references in Mr. Ashmore's statement duplicate evidence at trial. The court finds, however, that "the statements in all of the F.B.I. reports must be viewed together for their cumulative effect. As the Third Circuit has explained, '[c]ertainly, the effect of each non-disclosure not only must be considered alone, for the cumulative effect of the non-disclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial [or a resentencing proceeding].'" 730 F.2d at 1356; Pet. Appendix 106-07 (citing United States ex rel Marzeno v. Gengler, 574 F.2d 730, 736-737 (3rd. Cir. 1978)).

Mr. Ashmore's suppressed statement also reported that while working in his barn after 5:00 p.m. on March 17, he repeatedly tried to reach his wife on the pickup truck's mobile telephone. Ashmore stated that during one of the calls someone answered, but hung up the receiver without speaking.

As disclosed in his suppressed statement, Mr. Ashmore's daugher also had attempted to reach her mother on the mobile

phone after school the same day. She experienced the same sequence - someone answered the call and replaced the receiver without speaking. These incidents in Ashmore's suppressed statement corroborate Mrs. Weaver's statement that she saw three people in the Ashmore pickup truck during the same time period. Again, the impact of the evidence is that other people were involved in the kidnapping.

Thus, the withheld evidence was clearly material to the penalty stage. The Tenth Circuit found the suppressed material to be mitigating evidence "because it relates to the circumstances of the offense as a whole, and tends to support inferences that others were involved in the criminal episode, that Chaney may not have personally killed the victims, and that he may not have been present when they were killed." 730 F.2d at 1352; Pet. Appendix 83. The opinion properly relies upon Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), for the proposition that a defendant must be allowed to offer testimony of involvement of others in a murder as mitigating evidence at sentencing. The State's Brady violation prevented Chaney from making this offer.

Second, the Tenth Circuit opinion finds that admission of the suppressed evidence might have caused the jury not to find aggravating circumstances beyond a reasonable doubt. 730 F.2d at 1352; Pet. Appendix 84-86.

Third, at sentencing the jury instructions included permission to consider as mitigating circumstances whether the defendant was an accomplice in a murder committed by another. In response, the State argued to the jury that the instruction had no application and asked rhetorically if "there [had] been any shred of evidence in this case about anyone who committed this crime except Larry Chaney." 730 F.2d at 1352; Pet. Appendix 86-87 (emphasis in the original). The Tenth Circuit

concluded that the suppressed F.B.I. reports might have caused at least one juror to doubt the prosecutor's argument and vote differently on the death penalty. Thus, the court correctly applied Agurs' standard of materiality in determining that the suppressed evidence mig.t have affected the jury's imposition of the death penalty.

The Court of Appeals correctly overturned the death penalty under Enmund v. Florida, 458 U.S. 782 (1982) which held that imposition of the death penalty is unconstitutional in the absence of proof that Respondent "killed or attempted to kill, and regardless of whether [Respondent] intended or contemplated that life would be taken." Id. at 801. Since the suppressed evidence undermines the jury's finding of aggravating circumstances, required for the death penalty, the sentence was properly vacated.

4. The Second Issue Under Question Two Presents No Issue Appropriate for Review Here.

Petitioner's additional and inappropriate objective under Question Two is this Court's rewriting of Oklahoma's death penalty statute to exclude the statutory requirement of a unanimous jury verdict in support of the death penalty. Petitioner makes an alternative argument should the suppressed evidence be deemed material to punishment under Agurs. The State argues that where a unanimous verdict is required, the suppressed evidence must meet Agurs' "reasonable doubt" standard of materiality. Petitioner complains that the "might have affected" standard places too high a burden on the State, when imposing its death penalty. It argues that since a unanimous jury verdict is not constitutionally required, a Brady - Agurs standard which interferes with Oklahoma's requirement of a unanimous jury verdict for imposition of the death penalty is "an

unrealistically high barrier." Petition 46. Petitioner seeks a revision of Agurs to avoid its own statutory requirements. Obviously, this Court is not responsible for the inapplicability of Oklahoma's death penalty when a determination has been made under Agurs that the "might have affected" standard is appropriate. The State of Oklahoma writes its own statutes and must abide by the results.

CONCLUSION

For the foregoing reasons, Respondent, respectfully submits that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HOLLAND & HART

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APPENDIX A

Trial Court's Order

EDITOR'S NOTE

PAGES 1 thru end WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRICT COURT
FILED
MAY 9 1977
DON R. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,
Plaintiff,
vs
LARRY EUGENE CHANEY a/k/a LARRY LEE CHANEY,
Defendant.

Case Nos. CRF 77-755
CRF 77-756

O R D E R

Now on this 6th day of April, 1977 this matter comes on before me, the undersigned Judge of the District Court, upon the Defendant's formal motion to produce.

After reading the motion and hearing the evidence the Court finds that the motion should granted in part.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the State of Oklaoma produce for the Defendant's inspection and use the following material:

I.

Written or recorded statements ~~or summary of any such statements~~ made by the Defendant in this case, or copies of any statements, admissions, confessions, or declarations against interest ~~verbatim or otherwise~~ which have been made by the Defendant and the names of the persons taking such statements.

II.

Any and all other evidence now in the custody of the District Attorney's office, the Tulsa Police Department, the

Tulsa County Sheriff's office, the Federal Bureau of Investigation, the State Crime Bureau for the State of Oklahoma, or any other agency of any State or Federal government, which may be favorable to the Defendant or ~~is~~ is exculpatory.

III.

All reports of a scientific nature, and the subject matter of these reports, which may have been prepared by an expert, technologist, identification officer, or other scientific authority pertaining to any instrument, substance or means allegedly used in the commission of the crime and any report made or which may be made which relates to any fingerprints, ballistic reports, handwriting exemplars, hair samples, blood samples, or any photographs of the crime scene together with the prints, exemplars, samples, photographs or any scientific material relating to this case which may be exculpatory in nature or favorable to the Defendant.

IV.

Any physical or tangible objects in the possession of the District Attorney's office, the Tulsa Police Department, the Tulsa County Sheriff's office, the Oklahoma State Bureau of Investigation, or the Federal Bureau of Investigation, or any other governmental agency including, but not limited to, items taken from the Defendant's personal property, together with any written reports whether of a scientific nature or not ~~that~~ the State intends to use to connect or identify this Defendant with this alleged crime.

The Honorable Earl Truesdell
JUDGE OF THE DISTRICT COURT

APPENDIX B

F.B.I. Witness Reports

FEDERAL BUREAU OF INVESTIGATION

OKLAHOMA CITY	OKLAHOMA CITY	4/5/77	3/17/77 - 4/1/77

TITLE OF CASE
CHANGED
LARRY EUGENE CHANEY, aka
Larry L. Chaney
Larry Lee Chaney
Larry Leon Chaney
Lee Leonard Chaney;
KENDAL INEZ ASHMORE (Deceased)
VICTIM;
KAREN ANNE ENSOR (Deceased)
VICTIM

REPORT MADE BY: SA [redacted] BIC
CHARACTER OF CASE: KIDNAPING

Title marked changed to include correct spelling of first name and to include middle name of KENDAL INEZ ASHMORE and to add alias of subject as LARRY LEE CHANEY.

REFERENCES:

Oklahoma City telephone calls to the Bureau 3/17/77 and 3/18/77.
Oklahoma City teletypes to the Bureau 3/18, 19, 22 and 23/77.

- P -

ADMINISTRATIVE:

Although there is no apparent violation of the Federal Kidnaping Statute involved in this matter, upon the recommendation of

ACCOMPLISHMENTS CLAIMED | NO MORE | ACQUITTALS

(1) - Bureau
1 - USA, Tulsa
1 - Tulsa County District Attorney
S. M. FALLIS, JR.
2 - Oklahoma City (7-1327)

DO NOT WRITE IN SPACES BELOW

7-17007-15

REC-4
ST-10
DE-37
FBI

DATA PROC

84 APR 2 S 1977

COVER PAGE

OC 7-1327

U. S. Attorney NATHAN G. GRAHAM, NDO, Tulsa, a copy of this report is being furnished to Tulsa County District Attorney S. M. FALLIS, JR. for his assistance in the prosecution of subject in local court on charges of Kidnaping for Extortion and Murder.

LEAD:

OKLAHOMA CITY

AT TULSA, OKLAHOMA. Will follow local prosecution.

Bs
COVER PAGE

b7C
D

[redacted] He is presently caring for stock in the area of 91st Street and Memorial Avenue. He advised he rents this pasture land which he noted is located next to an unoccupied produce building and an abandoned house. He states he makes daily trips to this area for the purpose of tending to his stock.

[redacted] advised at approximately 7:30 A.M. this date he went outside of his residence which is located about one-quarter mile from the above intersection and fed his stock. He stated he then drove up to the rent pasture and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building. [redacted] stated this occurred between 8:00 and 8:30 A.M. and was positive on the time.

[redacted] stated the truck had just driven in and the man opened the door when he first observed it and therefore he could not tell the direction from which it had been driven. He stated the driver passed in front of the parked truck and walked over to a car that was waiting for him. He advised the car, which he could only describe as being black, was parked on the east side of the building facing south and he could only see a small part of the front end. He advised he did not know if there was another individual in the black car but assumed there was but could not give a description. He advised he saw all of this as he was pulling through the gate and did not actually see the truck driver get into the car but the next time he looked in that vicinity both the driver and the car was gone. He stated he did not know in what direction they had gone but he believes if they had driven west he would have observed them.

[redacted] advised the truck he observed is the truck that is still parked there at the present time in the same location.

All 26

3/18/77	Tulsa, Oklahoma	Oklahoma City	
SA [redacted]		File # 7-1327	
SA [redacted]		3/22/77	

b7C

30

He advised the man driving this truck which he observed from approximately 50 yards is a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat. No other description recalled. . . .

51

The following investigation was conducted by SA [redacted] b7c

AT TULSA, OKLAHOMA

[redacted] advised he was riding home from school on Thursday, March 17, 1977, on the Jenks Public School Bus and came to the intersection of 91st and Memorial, where the bus turns South on Memorial before arriving at East 86th.

[redacted] advised the time was approximately 4 or 4:30 P.M. and he noticed a new looking red pickup truck with a white stripe across it. He said the reason he noticed this truck was because it was shiny red and he observed a "clip-on" type CB antenna on the driver's side of the truck. [redacted] this truck was parked on the southside of the truck. [redacted] this truck was parked on the south side of the Bixby Produce Building, next to it, with the nose of the truck facing west. He further explained the truck was parked near the awning which hangs over the south side of the building.

[redacted] said he did not observe anyone near the truck at that time. He continued that he saw the truck again in the same place at approximately 5:30 P.M. when he was going to soccer practice the same day. [redacted] mother, [redacted] was present and advised [redacted] was familiar with pickup trucks, and said she was confident if he said the truck was red, she would believe it.

[redacted] advised the bus driver was [redacted], who drives bus No. 12 for the Jenks Public School and stated she would contact [redacted] and have her get in touch with the FBI. b7C,D

The following investigation was conducted by SA [redacted] b7C

On March 21, 1977, [redacted] telephonically advised that she drives the school bus for the Jenks Public School, which passes the intersection of East 91st and South Memorial. On the afternoon of March 17, 1977, she b7C

OC 7-1327

stopped at this intersection while she was driving on East 91st. There is a large amount of traffic at this intersection and she had to sit there for some period of time until she could turn onto South Memorial. She did not observe any vehicles parked in this area because she was so busy watching traffic. However, she was parked there attempting to turn onto Memorial for a long enough period of time that any of the children on the school bus could have accurately observed any vehicle parked there.

[redacted] stated that a school bus for the Union School System also turns at 91st and Memorial. This bus is unloaded of school children at the time it passes this intersection and the driver would have more time to observe things in the area.

b7C

FEDERAL BUREAU OF INVESTIGATION

1 — 3/30/77

[redacted] advised she lives in the vicinity of the ASHMORE residence and she is acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence. She advised she also recognizes the vehicles owned by the ASHMORE's. [redacted] stated that Payton's Grocery Store is located at 91st and Union Streets which is patronized by both Mrs. ASHMORE and herself.

b7C

b6

She advised at approximately 4:10 P.M. on Thursday, March 17, 1977, she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORE's. She advised this occurred in front of the Bell's Grocery Store, 301 E. Main, Jenks, Oklahoma. She advised she pulled in to the parking lot in front of Bell's Grocery Store and when she got out of her car she glanced over to a distance of about 8 or 9 parking spaces and saw Mrs. ASHMORE sitting in a truck with two other people. She advised Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side. She advised she could not describe either of the other two individuals nor could she describe Mrs. ASHMORE's wearing apparel.

She advised she had parked facing the street and Mrs. ASHMORE was parked facing the store west of her. She advised she could not see that there was any problem nor did she notice Mrs. ASHMORE looking at her or talking to anyone in the truck. She advised she just glanced at the truck, recognized Mrs. ASHMORE and turned to enter the store. She advised she came out approximately ten minutes later and the truck was gone.

She advised there were no other vehicles parked between her car and Mrs. ASHMORE's truck.

3/22/77 — Tulsa, Oklahoma — Oklahoma City 7-1327

[redacted] b7C — 3/28/77

She stated she is certain of the time in view of the fact she had picked her son up at school at 4:00 P.M. and drove straight to the store. She advised while in the store parking lot she recalled two firetrucks and two police cars with sirens went by the store.

FEDERAL BUREAU OF INVESTIGATION

1.

Date of transcription 3/23/77

PHILIP H. ASHMORE, 9148 S. Lord West Avenue, phone 299-9791, furnished the following information:

He is presently the owner of Kendalwood Corporation, a construction firm involved in building homes, apartments, etc., and in that connection has an office at a construction site at 5602 E. 46th Street, Tulsa.

On Thursday, March 17, 1977, he was at the site when he received a telephone call about 9 A.M. from his wife, KENDALL, who saidshe needed his pickup to have hay to feed the horses and to run some errands. She said she would be by at 9:30 but she was a little late and arrived around 10 A.M. accompanied by KATHY BROWN, an employee of ASHMORE.

He gave his pickup to his wife who left the family station wagon for him. He described the pickup as a 1976 3/4 ton Ford, light blue cab over white body, with a blue horizontal stripe. It has a large white tool box in the bed and is equipped with large wide tires; it also has a CB antenna in the center of the roof of the cab and a small mobile phone stinger antenna on the left side of the cab. The mobile phone number is 560-1736. He did not know the license number.

KENDALL said she was going to buy some hay for the horses and usually bought from [redacted] She made no mention of further plans for the day. b7C

He heard nothing further from his wife that day.

[redacted] About 5 P.M. he left his office and returned hom and noticed that some new hay had been put up in b7C

Interviewed on 3/17/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

SA [redacted] b7C

by SA [redacted] Date dictated 3/17/77

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

b7C

the barn. [redacted] continued to attempt to reach his wife on the mobile phone and on one occasion, someone apparently answered the call but put down without speaking. He thought [redacted] also had someone do the same thing during one of her calls. He made other calls after this but the mobile phone only rang.

b7C

He was in the tack room of his barn about 6:30 P.M. when he received a telephone call from an unknown man. ASHMORE reconstructed the conversation as follows but cannot recall the exact words:

"Are you Mr. ASHMORE?"

"Yes."

"You listen to me and you listen good. I've got your wife and that Honky who works for you. If your children want to see their mother again, you go down to the bank and get a half a million dollars in one hundred dollar bills and put it in a canvas sack. There are four of us. We're not kidding. If your wife tries anything like that Honky who works for you, we'll do her the same way."

"I haven't got that kind of money."

"Get what you can. I'll call you."

"When?"

"Tomorrow night."

"What time?"

"Late."

"You tell anyone who's looking for your wife that she's out looking at horses. Don't try any monkey business."

ASHMORE believed the caller to be a white male, about 45, spoke in a gruff, low voice with an apparent native Oklahoman accent. He heard no background noises and thought the call was local in nature.

He said a man called his wife about a week ago and made an appointment for Sunday, March 13, 1977, to bring two Morgan horses to Tulsa for KENDALL to appraise. The man, he thought, said he was from Arkansas and was selling some land to buy the horses but didn't know their value. The man never showed up but called back this week and made another appointment for Thursday. He recalled that the man claimed he would put the horses in a stable or barn in the Tulsa area and KENDALL would go there to see the horses. ASHMORE thought the stable was in Broken Arrow but LAURA thought it was in Sand Springs.

ASHMORE described his wife as a white female, born March 24, 1941, 5'6", 110, brunette, hazel eyes and having a small red spot on the right side of her forehead. She was wearing double diamond rings on left ring finger and a gold wristwatch with diamonds. She was wearing blue jeans, possibly a blue jean jacket and white jogging shoes with blue stripes, and carrying a tan leather shoulder strap purse with the initials "K.I.A."

KATHY BROWN is described as a white female, 23 years, 5'2", 150, lond blond hair, blue eyes. He could not recall her clothing. He recalled KATHY has a boy friend, name unknown, who is a truck driver and from the same town of Alagan (phonetic), Michigan. KATHY's parents are Mr. and Mrs. LAWRENCE BROWN, telephone 616-673-4827. KATHY has been employed as a horse trainer since June, 1976 and to his knowledge has no relatives in Oklahoma.

[redacted]

b7C

ASHMORE recalled that [redacted] had a riding lesson scheduled at 3:30 P.M. this date with KATHY BROWN but apparently was late, not arriving until 3:45 P.M. or 4:00 P.M.

b7C

[redacted]

b7C

ASHMORE said since receiving the original call, he has been extremely upset and possibly has forgotten other details which he would furnish later.

APPENDIX C

Map of Oklahoma

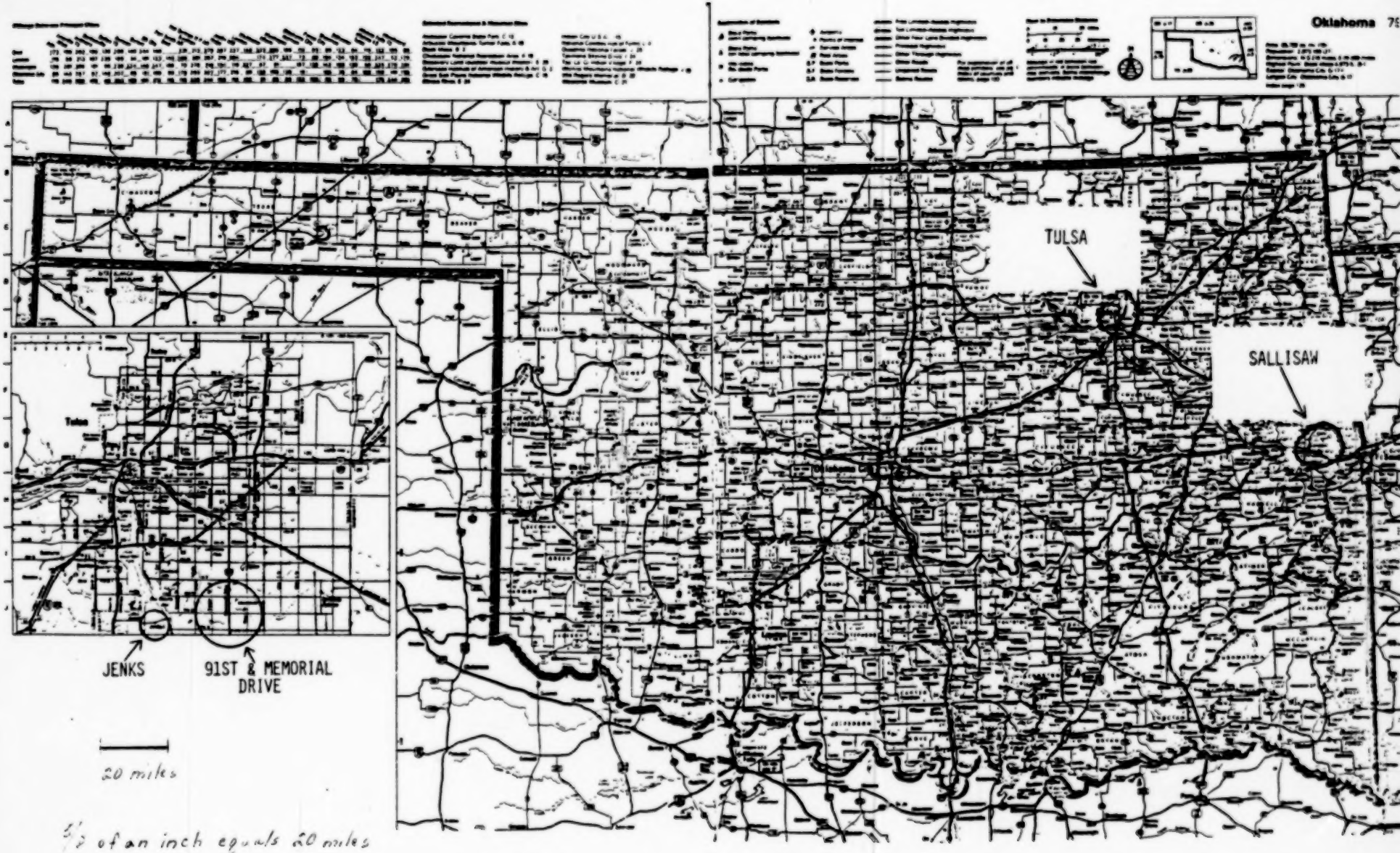
Oklahoma
TULSA
SALLISAW
JENKS
91ST & MEMORIAL
DRIVE
20 miles
½ of an inch equals 20 miles

EXHIBIT A

SUPREME COURT OF THE UNITED STATES

JOHN N. BROWN, WARDEN *v.*
LARRY LEON CHANEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–169. Decided December 10, 1984

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is denied.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

In this case, the Court of Appeals vacated respondent's death sentence because it found that the state prosecutor withheld information that might have been material to the jury's sentencing decision. I would grant certiorari because I believe this case raises two important issues worthy of this Court's attention—how to distinguish a specific from a general request for exculpatory information, and how to determine whether withheld information was material to a sentencing decision.

I

Kendal Ashmore was a horse breeder. On the morning of March 17, 1977, Mrs. Ashmore and her assistant, Kathy Brown, went to meet a man who had expressed an interest in Morgan horses. Phillip Ashmore returned home from work that evening to find that his wife had not returned. He soon received a telephone call in which the caller told him that he had abducted Mrs. Ashmore and Brown. The caller demanded a $½ million in $100 bills, and warned Mr. Ashmore not to tell anyone about the call. Mr. Ashmore called his attorney, who contacted the Federal Bureau of Investigation.

The next day, Mr. Ashmore gathered the ransom money. The caller again telephoned, and told Mr. Ashmore to leave

the money at a specified location at a local rodeo arena or his wife would be "dead." The caller also told Mr. Ashmore that the Ashmore's truck was at 91st Street and Memorial Avenue in Tulsa. This call was traced to respondent's home phone.

Mr. Ashmore delivered the money to the predetermined spot at the rodeo grounds. Later that same day, he received a call telling him that the money had not been left in the proper place, that he should pick up the money, and try again the next day. The caller also told Mr. Ashmore that if he did not do exactly as he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail . . . ." This call was traced to a service station phone booth; the respondent's palm print was taken from the receiver handle on the telephone.

After the second call, the police set up surveillance of the respondent's home, which was about two miles from the rodeo grounds where the money was to be left. At about 3:20 a. m., the police arrested the respondent and searched his house. The bodies of Mrs. Ashmore and Brown were later found in a shallow grave on property rented by the respondent.

The respondent was indicted and tried for the murder of Mrs. Ashmore. Prior to trial, the respondent made several requests for exculpatory evidence. Only the following four were considered by the court below:

> "1. Statements of all persons who have been interviewed by . . . any . . . governmental agency in connection with the subject matter of this case . . . .
>
> "2. Stenographic recordings or transcriptions of any oral statement made by any person to . . . a member of any . . . governmental agency in connection with the subject matter of the case.
>
> . . . . .
>
> "4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.
>
> . . . . .
>
> "13. Any and all oral statements made to . . . any . . . law enforcement official."[1]

Four FBI records were not disclosed pursuant to this request that arguably should have been. None of the withheld documents bear on the guilt or innocence of the respondent. None suggest that he was not involved in the kidnaping, and none are relevant to rebut an inference that he intended that the victims be killed.

The first, and the one considered most critical by the Tenth Circuit, is a statement made to the FBI by Ms. Poppy Weaver. Ms. Weaver said that at 4:10 on the afternoon of March 17, 1977, she was in a store parking lot in Jencks, Okla. She glanced from a distance of about eight or nine parking spaces at a blue-and-white pickup she identified as belonging to the victim. The FBI report indicates that Ms. Weaver stated that she saw Mrs. Ashmore sitting in the driver's seat, with an unidentified man and woman also in the car. The FBI statement does not reflect the fact that Ms. Weaver later stated that she was never able to identify Mrs. Ashmore as having been in the truck.[2]

The second is a statement made to the FBI by J. C. Hamilton. Mr. Hamilton said that he saw a man get out of the Ashmore pickup truck at 91st Street and Memorial Avenue in Tulsa between 8 a. m. and 8:30 a. m. on March 18, 1977.

---

[1] 730 F. 2d 1334, 1340 (CA10 1984) (emphasis deleted).

[2] Chaney's own attorney stated at the federal habeas hearing that Ms. Weaver told him that "she in fact did not make those statements, was not sure, and was not sure at this time, which was April of '81, nor was she sure in March of 1977 when Agent McLain talked with her." *Id.*, at 1355, n. 27. In the course of the federal habeas proceeding, the District Court stated that both the District Attorney and Chaney's counsel had indicated that Ms. Weaver had stated that she could not testify that the woman she saw on March 17 was the victim.

Mr. Hamilton said he saw the man then get into a black car that was waiting there.[3]

The third is a statement by a Jenks public school student, Kyle West. The youth told the police that he saw a "shiny red" pickup truck parked at 91st Street and Memorial Avenue on the afternoon of March 17. His report said nothing about any other vehicles.[4]

The fourth is a transcription of a statement made by the victim's husband. During the first phone call from the kidnappers, Mr. Ashmore told the FBI, the caller told him: "There are four of us. We're not kidding. If your wife tries anything like that Honky that works for you, we'll do her the same way."[5]

At trial, respondent was convicted of murder and sentenced to death.[6] Although his counsel argued that unnamed accomplices might have been the actual killers, no testimony was introduced to support this claim. On appeal, the Oklahoma Court of Criminal Appeals affirmed, *Chaney* v. *State*, 612 P. 2d 269 (1980), and this Court denied the petition for a writ of certiorari. *Chaney* v. *Oklahoma*, 450 U. S. 1025 (1981).

[3] The Tulsa County District Attorney S. M. Fallis testified that this information was not exculpatory because the truck was already in police custody at the time of this sighting. Fallis testified that the individual seen leaving the truck was an employee of Mr. Ashmore's. *Id.*, at 1348.

[4] Mr. Fallis explained that this statement was not exculpatory because there was no known connection between any red pickup truck and the facts of this case. *Ibid.*

[5] Mr. Fallis testified that tapes of the other phone calls, in which the caller stated that more than one person was involved, were played to the jury. Even if exculpatory, this evidence was thus cumulative.

[6] The jury found all four aggravating circumstances argued by the State:

"1) the defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.

"2) The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 from the family of Kendal Inez Ashmore.

"3) The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.

"4) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against defendant for the kidnapping charge." *Id.*, at 1352, n. 24.

At least the first two aggravating circumstances would be unaffected by a finding that Chaney was not present at the killings, so long as he intended that the victims die. The Court of Appeals did not consider Chaney's intent.

After Chaney's direct appeals were exhausted, the four withheld documents at issue here surfaced. After two unsuccessful state-court applications for post conviction relief, Chaney sought a writ of habeas corpus from the Federal District Court, arguing that the prosecutor wrongfully withheld the requested documents. The District Court refused to grant the writ, finding that Chaney's counsel had made only a general request for exculpatory evidence, and, under the due process standard applicable to such requests, the withheld evidence did not create a reasonable doubt as to Chaney's conviction or death sentence.

The Tenth Circuit reversed, and vacated the death sentence. 730 F. 2d 1334 (1984). It found that the requests for information were "as specific as possible" because Chaney did not know the names of the withheld witnesses. It then found that while the withheld evidence was not material to Chaney's conviction, it was material to the imposition of the death penalty because the withheld reports "might well have made the jurors, or one of them" doubt the prosecutor's claim that Chaney had no accomplices. It found that the possibility that others were involved in the kidnaping and the killings bore on the establishment of aggravating circumstances, and constituted "important mitigating evidence."

II

It is well settled that in certain circumstances a prosecutor is required to disclose exculpatory evidence to a defendant. *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Moore* v. *Illinois*, 408 U. S. 786 (1972). In *United States* v. *Agurs*, 427 U. S. 97 (1976), this Court recognized that withholding of exculpatory testimony could arise in three different situations. The Court held that the knowing use of perjured testimony requires that the conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, at 103. The second situation involves a "specific request"—a request that gives "the prosecutor notice of exactly what the defense desire[s]"—for information in the prosecution files. *Id.*, at 106. In the face of such a request, the information should be provided either to the defense or the court if "the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists . . . ." *Ibid.* The third situation arises when only a general request or no request at all has been made, perhaps because "exculpatory information in the possession of the prosecutor" is "unknown to defense counsel." *Ibid.* In this situation, all "obviously exculpatory" evidence should be provided to the defense; if it is not, and the omitted evidence "creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112. The Court recognized that the prosecutor was not obligated to disclose "any information that might affect the jury's verdict," *id.*, at 108, because the Constitution "surely does not demand" complete discovery of prosecution files as a routine practice. *Id.*, at 109.

In the context of *Agurs*, the distinction between "specific" and "general" requests seems self-explanatory. The paradigmatic "specific" request is one for statements made to police by a named accomplice. *Id.*, at 104. The paradigmatic "general" request seeks "anything exculpatory" or "all *Brady* material." *Id.*, at 106–107.

Since *Agurs*, however, courts and prosecutors have struggled to distinguish "specific" from "general" requests. Part of the problem arises because not all requests fall into obvious "specific" or "general" categories. Part of the problem arises from a tension inherent in *Agurs*' formulation: the defense must give the prosecutor notice of what is desired, but notice alone—such as notice that the defense desires every document in the prosecution's files—is not enough to overcome the prosecutor's interest in avoiding premature or excessive discovery.

Some courts have resolved this tension in a common-sense manner. They have found "specific" only those requests that give notice "of the defendant['s] interest in a *particular* piece of evidence." *Commonwealth* v. *Jackson*, 388 Mass. 98, 110, 445 N. E. 2d 1033, 1040 (1983) (emphasis added). Nor is it a "specific" request to seek statements of all persons who have been interviewed by the State but who are not expected to be called as witnesses. *Thompson* v. *Missouri*, 724 F. 2d 1314 (CA8 1984). Similarly, a request for written statements taken from any witnesses subsequent to the murder is "general." *United States ex rel. Moore* v. *Brierton*, 560 F. 2d 288 (CA7 1977).

The Court of Appeals' holding below conflicts sharply with this body of cases. It treats as "specific" those requests which seek in a blanket fashion all reports prepared by all investigatory agencies. See also *United States* v. *Warhop*, 732 F. 2d 775, 778 (CA10 1984) (request for any "F. B. I. interview statements" was "more than sufficient" to be specific) (citing opinion below). It justifies this broad right of discovery by focusing on what heretofore has been an imponderable—the defendant's ability to phrase the request more precisely.

This Court has suggested that the critical distinction does not derive from the defendant's ability to frame a more detailed request; the Court in *Agurs* understood that "exculpatory information in the possession of the prosecutor may be

unknown to defense counsel." *Agurs*, *supra*, at 106. The Court addressed this dilemma by requiring some information to be released when there was only a general request or no request at all. In *Agurs*, it did not matter whether the withheld information was available elsewhere; this would suggest that neither does it matter whether the request was "as specific as possible."

The opinion of the Court of Appeals conflicts squarely with those courts that have held that sweeping requests for all information in the government's files are not "specific." It conflicts fundamentally with *Agurs* by relying on the state of the defendant's knowledge; its holding has already been followed within its Circuit. The conflict at issue here deserves the attention of this Court.

III

Even if we were to agree with the Court of Appeals that the requests for information here were "specific," a substantial question still would arise as to whether the withheld information justifies setting aside the jury's sentencing decision. This Court has never applied *Brady* or *Agurs* to a sentencing decision.[7] The question of what constitutes "material" information in the context of the sentencing decision merits our attention.[8]

To decide whether the withheld information was material to the sentencing decision raises a host of questions that have never been considered by this Court. *Brady* and *Agurs* in terms do not deal with evidence on mitigating circumstances.

[7] In *Brady*, this Court stated in dicta that withheld evidence must be produced when it is material to either guilt or punishment, but did not actually need to reach the issue because the right to a resentencing hearing was not before the Court. The Court has never commented on what would constitute "materiality" in the sentencing context.

[8] One obvious difference distinguishes the application of the "materiality" test to the sentencing phase of the trial. In the guilt phase, some evidence is not relevant to the elements of the substantive offense. In the sentencing phase, virtually all credible evidence is relevant.

Do the standards for reversible error that apply in the guilt phase apply unchanged in the sentencing phase, or must new standards be crafted? Should the court look to the sentence imposed in light of all the evidence, or should it look only to whether a violation occurred? Do they apply only to sentences imposed by juries, or also to sentences imposed by judges? Do *Brady* and *Agurs* apply only to capital sentencing decisions, or to all sentencing decisions?

In addressing these issues, the Court of Appeals held that the death penalty should be set aside because the withheld evidence "might have affected" one juror's assessment of whether mitigating circumstances existed but did not consider the overwhelming evidence that the respondent intended that the victim would be killed.[9]

[9] The evidence is overwhelming both that Chaney intended that the victims would die, and that he was the actual killer. The evidence indicates that he was the caller who warned that Mrs. Ashmore would be "dead" or pieces of her body returned in a box if the ransom request was not complied with—one call was traced to his home phone; his palm print was found on the phone from which the other call was made. Other physical evidence—the contents of the victim's stomach, the length of the hair on her legs, the sharpness of the crease in her pants, the amount of makeup on her face, the condition of the gravesite—all supported an inference that she was killed within a short time of her abduction, before Chaney's arrest. Still more evidence—the theft of towels like those used in the murder from the hotel room he stayed in, his sighting near the burial scene at about the alleged time of the killing and burial, with dirt on his pants up to the knees—all constitute powerful evidence that he was involved in the actual killing.

Moreover, some of the withheld evidence supports an inference that Chaney, and not any supposed confederate, was the actual killer. Ms. Weaver reportedly told the FBI that she saw the Ashmore's pickup truck about 100 miles from the burial site on the afternoon of the kidnaping, at about the time the prosecution argued that the murder occurred. She saw three people in the truck; she ultimately could identify none of those persons as Mrs. Ashmore. At about this time, Chaney was seen near the burial site. One logical conclusion is that any supposed confederates were far from the burial site in Mrs. Ashmore's car but without Mrs. Ashmore at the most likely time of the killings, while Chaney was near the grave.

The approach taken by the court below significantly alters the balance struck in *Agurs* between a prosecutor's duty to reveal exculpatory evidence and his interest in avoiding premature or excessive discovery of his files. Evidence material to mitigation is not always self-evident; here, at most, the mitigating evidence shows only that other people were involved with the respondent in a scheme to kidnap and murder two women. A prosecutor cannot fairly be presumed to recognize the utility of such information to the defense. The only way a prudent prosecutor could ensure sustaining a conviction under the rule applied below is to open to the defense all files—including those files that deal with ongoing investigations into alleged accomplices. In *Agurs*, this Court explicitly held that this was not constitutionally required.

IV

The Court of Appeals opinion highlights a conflict in the courts, and raises broad issues worthy of this Court's attention. I would grant the petition for a writ of certiorari.

This supports, rather than contradicts, a finding that Chaney himself was the killer.

The court below did not take this evidence into account. Cf. *Strickland* v. *Washington*, 466 U. S. ——, —— (1984) (When sentence challenged for lack of effective assistance of counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death").